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No.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1989

UNITED STATES CAN COMPANY,
a Georgia Corporation, CONTINENTAL
BEVERAGE PACKAGING, INC.,
a Delaware Corporation,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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QUESTION PRESENTED

Does Section 301 of the Labor-Management Relations Act preempt state-law, non-substantive remedies—even if characterized as "nonnegotiable"—invoked by a party to a collective bargaining agreement to prevent anticipated violations of the contract?

STATEMENT REQUIRED BY RULE 28.1

United States Can Company is a wholly owned subsidiary of Inter-American Packaging, Inc., a privately held corporation, and is Inter-American Packaging, Inc.'s only subsidiary. United States Can Company has no subsidiary companies. Inter-American Packaging, Inc. and United States Can Company do not have any affiliate corporations. G.P. Acquisition Company, Inc. and its wholly-owned subsidiary CCC Series 200, Inc., formerly affiliates of Inter-American Packaging, no longer exist as corporate entities, having been merged into United States Can Company.

Continental Beverage Packaging, Inc., the company formerly known as Continental Can Company, USA, Inc., is a wholly-owned subsidiary of Continental Can Company, Inc. which, in turn, is a wholly-owned subsidiary of Kiewit Continental Inc. Kiewit Continental Inc. is a wholly-owned subsidiary of Kiewit Holdings Group, Inc. which, in turn, is a wholly-owned subsidiary of Kiewit U.S. Co. Kiewit U.S. Co. is a wholly-owned subsidiary of Peter Kiewit and Sons', Inc. Other United States affiliates (except for under 10% affiliates) are CWC Leasing, Inc., Continental Can Leasing, Inc. and Unicon Producing Company. In addition, Kiewit Continental Inc. is a shareholder or partner in numerous foreign companies which are engaged in the packaging business outside the United States.

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OPINIONS BELOW

This petition seeks review of the majority (4-3) opinion and judgment of the Supreme Court of Wisconsin which, with the dissenting opinion, are reported as *International Association of Machinists & Aerospace Workers* v. *United States Can Co.*, 150 Wis. 2d 479, 441 N.W.2d 710 (1989), and are reproduced in the appendix to the petition (1A-32A). The certification of importance of the Wisconsin Court of Appeals is unreported and is reproduced in the appendix (33A-39A). The opinion of the Circuit Court for Racine County is unreported and is reproduced in the appendix (40A-44A).

JURISDICTION

The decision of the Wisconsin Supreme Court issued on June 27, 1989. This petition is therefore timely under 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision below is final in that it finally disposed of the federal preemption issue. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-98 n.5 (1983).

STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the Wisconsin Fraudulent Conveyance Act (Wis. Stat. § 242 *et seq.* (1985-86), *repealed and recreated by* Uniform Fraudulent Transfer Act, Wis. Stat. § 242 *et seq.* (1987-88) are:

> **242.01(3)** "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.
>
> **242.04 Contract producing insolvency, fraudulent.** Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.
>
> **242.05 Other specifications of legal fraud.** Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after

the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

242.07 Fraud in fact. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors.

STATEMENT OF THE CASE

As respondents IAM and its local unions ("IAM") argued below,[1] this case presents issues of "far-reaching significance in the fields of labor law [here, LMRA Section 301] and fraudulent conveyance law" (IAM Br. at 2). Specifically, it raises the question whether state laws—which provide remedies (characterized as "nonnegotiable") but no *substantive* rights—may be invoked by a party to a collective bargaining agreement to block a leveraged buyout because it is anticipated that the transaction will fraudulently violate rights grounded in the labor agreement. The Wisconsin Supreme Court's resolution of this question conflicts with controlling decisions of this Court and pertinent decisions of the First, Sixth, Seventh and Eighth Circuits.

Respondent IAM filed suit on June 3, 1987 in the Wisconsin Circuit Court, Racine County. The complaint alleged that U.S. Can in the spring of 1987 agreed to buy the general packaging division of Continental in a leveraged buyout which would be accomplished by pledging the assets of the packaging division to

[1]The plaintiffs below and respondents in this Court are the International Association of Machinists & Aerospace Workers, IAM Locals 437 and 710, and IAM Districts 10 and 172. Suit was brought by these labor unions on behalf of themselves and as authorized representatives of all IAM employees of United States Can Company, Continental Can Company, CCC Series 200, Inc., Inter-American Packaging, Inc. and GP Acquisition Company, Inc.

various lenders and unreasonably encumbering these assets with sixty-five million dollars of debt. Declining to pursue available federal labor law remedies (*see infra* note 3), the IAM instead claimed that it and its members located at facilities in both Wisconsin and Illinois were "creditors" of U.S. Can and Continental "under the collective bargaining agreements" for purposes of section 242.01(3) of the Wisconsin fraudulent conveyance statute "in the approximate amount of $19,950,000." *See* R. 2, ¶ 3; App. 14A-16A. The complaint alleges that this:

> indebtedness is comprised of matured as well as unmatured claims over the life of plaintiffs' current collective bargaining agreement for wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits, as well as claims asserted in various grievance and arbitration proceedings, *all owed to the employees pursuant to the collective bargaining agreement.*

See R. 2, ¶ 3 (emphasis added). Additional indebtedness directly to the IAM was claimed pursuant to the dues check-off and other provisions of the agreement. *Id.* ¶ 4. As relief, the complaint requested an order declaring the transaction "fraudulent" and enjoining its completion. *Id.* at p. 27. The companies interposed various defenses, including that the IAM's claims were preempted by LMRA Section 301 and Sections 7, 8 and 10 of the National Labor Relations Act, 29 U.S.C. §§ 157-58 and 160. R. 3, ¶ 30; R. 6, ¶ 30.

On July 24, 1987 the Circuit Court of Racine County granted the joint motion of the companies "on the pleadings" to dismiss the complaint. The trial court reasoned that the IAM's "undeniable basis for being in court" is the collective bargaining agreement and that whatever rights the unions had as "creditors" derived completely from that agreement. Therefore, any state-law claim brought on that "creditor" status must be pre-empted by LMRA Section 301. *See* App. 5A, 42A. Following this Court's decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985),

and *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987), the trial court also rejected the IAM's contention that it was merely asserting "independent" rights under the Wisconsin fraudulent conveyance act. The IAM's characterization "does not change the nature of the animal. The animal is still protection of rights guaranteed by the collective bargaining agreement." *See* App. 43A.

The IAM appealed to the Wisconsin Court of Appeals and, because this "case presents a potential conflict between federal labor law and state policy as expressed by the [Wisconsin] legislature" and "[t]he decision will have statewide, as well as nationwide, impact on mergers and acquisitions," that court in turn certified the following question to the Wisconsin Supreme Court: "Whether an action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by Sec. 301 of the Labor Management Relations Act when brought by a union and employees against an employer." *See* App. 2A, 35A, 39A.[2]

Four justices of the Wisconsin Supreme Court, notwithstanding their reversal in *Allis-Chalmers Corp.*, insisted that state-law remedies are available for violations of collective bargaining agreements and held that Section 301 did not preempt this action. The Wisconsin Court acknowledged this Court's directive in *Caterpillar*, 482 U.S. at 400, that "Section 301 governs claims founded directly on rights created by collective bargaining agreements, *and also* claims 'substantially dependent on analysis of a collective bargaining agreement.' " (emphasis added). *See* App. 10A. Nonetheless, it ruled that *Caterpillar* did not apply to this state law action to *enforce* the agreements here because substantial interpretation was not required. The Court held that Wisconsin's fraudulent conveyance remedies—although not "substantive" but

[2]The Wisconsin Supreme Court also took on certification a separate order which denied the IAM's request to set aside the original dismissal. Because it concluded that the complaint was improperly dismissed, the Supreme Court did not consider that separate order in rendering its decision. *See* App. 2A, n.1.

simply "remed[ies] to assist in the satisfaction of . . . substantive claim[s]"—were "nonnegotiable." Accordingly, such remedies could *never* be pre-empted because, the Court believed, such "remedial" rights "are significant ones in the panoply of most states' arsenals against those who would defraud creditors." *See* App. 14A-16A, 19A.

The Wisconsin Supreme Court also refused to hold the fraudulent conveyance claims pre-empted even though the IAM's "creditor status" undeniably had its "genesis" in the "employer-employee status, which is defined by one or more collective bargaining agreements." The Court believed that "whether that status arose as the result of obligations to them under the collective bargaining agreement is immaterial. It is the [creditor] status that counts, not its origin." *See* App. 4A, 14A, 21A. In this regard, the Wisconsin Court expressly rejected the majority opinion in *Deford* v. *Soo Line R.R.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S. Ct. 3265 (1989), which had, less than five months before, held that an action to declare the transfer of assets pursuant to a leveraged buyout fraudulent under the Minnesota Uniform Fraudulent Transfer Act was pre-empted by the Railway Labor Act.

In their dissent, Justices Ceci, Callow and Steinmetz were "at a loss to understand how the majority could conclude [that the complaint was not preempted by Section 301]." *See* App. 23A. Fearing that "applying state law rules of contract interpretation" would needlessly complicate and disrupt the "negotiation and administration of collective bargaining agreements," the dissent emphasized that "the debts the unions are seeking to secure exist solely because of the collective bargaining agreement." *See* App. 23A-24A, 25A. Under *Caterpillar* and the Eighth Circuit's decision in *Deford*, the fraudulent conveyance claims could not be "separate" or independent because a determination of the IAM's claims, including "claims asserted in various grievance and arbitration proceedings," would "*undoubtedly* force the court to

construe the meaning and impact of the numerous provisions of the collective bargaining agreement in light of the provisions and definitions of the Uniform Fraudulent Conveyance Act." Thus, "the companies' liability ["not just damages"] under state law is decided by reference to the collective bargaining agreement." *See* App. 25A, 27A, 28A & n.1 (emphasis in original).

REASONS FOR GRANTING THE WRIT

This case presents the question whether state-law claims which are purely remedial and provide no "substantive" rights may be invoked by a party to a collective-bargaining agreement to block a sale of a business in order to prevent an allegedly fraudulent violation of the agreement. The majority opinion of the Wisconsin Supreme Court is contrary to an entire line of decisions by this Court holding that Section 301 pre-empts state law claims seeking to enforce rights contained in a collective bargaining agreement. The Wisconsin Supreme Court also created a direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Deford*, as well as with decisions of the First, Sixth and Seventh Circuits.

Prompt resolution of these conflicts is a matter of fundamental importance. Until reversed or set aside, the Wisconsin Supreme Court's decision will needlessly inhibit and complicate the negotiation and enforcement of innumerable collective bargaining agreements. Under the Wisconsin Court's holding, parties to such agreements now have the option[3] of invoking state-law remedies

[3]Absent this state-law enforcement mechanism, the Wisconsin Court seemed to assume the IAM would be remediless. This assumption is entirely misplaced. Under Section 301, a labor union fearing the consequences of a sale of business may in appropriate circumstances invoke arbitration, *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees*, 417 U.S. 249 (1974), or may seek a "status quo" injunction to determine the rights of the parties and protect the interests of workers under collective bargaining agreements. *See*

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and needlessly complicating the otherwise orderly resolution of routine disputes through negotiation, administration and enforcement of labor contracts, to say nothing of disputes involving leveraged buyouts where millions of dollars are commonly at stake.

I. The Wisconsin Supreme Court's Decision Conflicts With Prior Decisions Of This Court And Pertinent Decisions Of The Federal Courts Of Appeals.

This case is fundamentally a state-law action to enforce rights under collective bargaining agreements. But this Court has consistently held that " '[s]tate law does not exist as an independent source of private rights to *enforce* [such] contracts.' " *Caterpillar*, 482 U.S. at 394 (emphasis added). This is because "substantive principles of federal labor law must be paramount in the area covered by the statute." *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Resort to state law is prohibited because "[t]he

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Howard Johnson, 417 U.S. at 258 n.3; *Local 1266, International Association of Machinists* v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (affirming preliminary injunction restraining completion of sale of corporate assets pending a decision by an arbitrator on IAM's claim that sale violated applicable collective bargaining agreement to prevent "frustration of arbitration" as required by Section 301). *Accord United Food and Commercial Workers, Local 626* v. *Kroger Co.*, 778 F.2d 1171 (6th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986) (recognizing right to seek status quo injunction pending sale of stores under Section 301 but denying relief on facts of case); *Lever Bros. Co.* v. *International Chemical Workers Union*, 554 F.2d 115 (4th Cir. 1976) (enjoining plant relocation pending arbitration under Section 301).

Further, it can be an unfair labor practice for the purchasing entity to refuse to bargain with the incumbent union or to hand it a *fait accompli* as to working conditions. *E.g., Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987) (requiring bargaining by successor employer); *Serrano* v. *Jones & Laughlin Steel Co., LTV Corp.*, 790 F.2d 1279 (6th Cir. 1986) (holding that, under guidelines of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state-law fraud claims related to closure of plant are preempted by National Labor Relations Act).

possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* Accordingly, "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' " *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). *See also Lingle* v. *Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1881 (1988); *Caterpillar*, 482 U.S. at 394; *Electrical Workers* v. *Hechler*, 481 U.S. 851, 856-57 (1987); *Allis-Chalmers*, 471 U.S. at 209-10.

Furthermore, the "policies that animate § 301" require that "the pre-emptive effect of § 301 must extend beyond suits alleging contract violations," *Allis-Chalmers*, 471 U.S. at 210-11, including those in which the claims, though not breach of contract claims *per se*, are "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394. While it is true that there is no pre-emption as to "substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective-bargaining] agreements," *Lingle*, 108 S. Ct. at 1883, such "independent," "substantive" rights are *not* at issue in this case. The Wisconsin Supreme Court held that Wisconsin's fraudulent conveyance act "confers no substantive rights . . . It is not intended to." *See* App. 16A. Rather, the fraudulent conveyance act exists to provide "but a remedy to assist in the satisfaction of [a] substantive claim"—here one having its "genesis" in the collective bargaining agreement. *See* App. 4A, 16A.[4]

[4]The Wisconsin Court demonstrated its confusion between substantive state rights which are independent of collective bargaining agreements and state remedies which are dependent upon such agreements by citing and relying upon *Baldracchi* v. *Pratt & Whitney Aircraft Division*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988) and *Air Line Pilots Assoc.* v. *UAL Corp.*, 874 F.2d 439 (7th Cir. 1989).

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Additionally, although the Wisconsin Court persists in its view, as in *Lueck* v. *Aetna Life Insurance Co.*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *rev'd*, 471 U.S. 202 (1985), that the remedies of the fraudulent conveyance act are "nonnegotiable," *see* App. 16A, this characterization cannot defeat pre-emption in an action, such as this one, to enforce collectively-bargained obligations:

> It is conceivable that a State could create a remedy that, although *nonnegotiable*, nonetheless turned on the interpretation of a collective bargaining agreement for its application. Such a remedy would be pre-empted by § 301.

Lingle, 108 S. Ct. at 1882 n.7 (emphasis added). The state-law remedy authorized in this case is, therefore, conceptually indistinguishable from the Wisconsin tort remedy for bad-faith handling of a claim for benefits under a collectively-bargained benefit plan, also sanctioned by the Wisconsin Supreme Court, but struck down by this Court in *Allis-Chalmers* as preempted by Section 301.[5]

Moreover, although the Wisconsin Supreme Court agreed that the IAM's very "status" as a "creditor" under Wisconsin law "is defined by one or more collective bargaining agreements," it went

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Rather than supporting the Wisconsin Supreme Court's holding here, both cases, as in *Lingle*, merely held that state *substantive* rights were not pre-empted by federal labor law. In *Baldracchi*, Section 301 was held not to pre-empt the state substantive right to be free from retaliatory discharge. In *Air Line Pilots*, the Seventh Circuit rejected UAL Corp.'s and the IAM's claim that the Railway Labor Act pre-empted the substantive requirements of Delaware takeover law.

[5]The Wisconsin Supreme Court's attempt to salvage the state remedies asserted here, because they are "significant ones in the panoply" of state remedies, *see* App. 19A, cannot succeed in light of this Court's holding that balancing of state and federal interests is "irrelevant" to Section 301 pre-emption because Congress "has provided that federal law must prevail." *Allis-Chalmers*, 471 U.S. at 214 n.9.

on to rule—in direct contravention of this Court's precedents—that "whether that status arose as the result of obligations to them under the collective bargaining agreements is immaterial. It is the [creditor] status that counts, not its origin." *See* App. 4A, 19A, 21A. This further holding does even greater violence to the purposes of the labor laws and the principles established by this Court. Far from being "immaterial," the "origin" of the IAM's creditor status—and petitioners' duties—makes *all* the difference, especially where, as here, state law fails to confer independent, "substantive" rights on those invoking it. *See Hechler*, 481 U.S. at 861-62 n.5 (where the " 'nature and scope of the duty . . . owed Plaintiff is determined by reference to the collective bargaining agreement,' " the claim must be pre-empted by Section 301); *Allis-Chalmers*, 471 U.S. at 216 (Wisconsin tort remedy is pre-empted because "the tort exists for breach of a 'duty devolv[ed] . . . by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself' . . . [T]he duties imposed and rights established through the state tort derive from the rights and obligations established by the contract.")

It is also clear that this case would have been decided differently in at least four of the federal courts of appeals, none of which has permitted a state-law claim to proceed where, as here, the state law fails to confer substantive rights independent of the labor contract. In *Deford* v. *Soo Line R.R.*, 867 F.2d 1080, 1086 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989), a decision viewed as controlling by the dissent in this case, *see* App. 29A, the Eighth Circuit analyzed Section 301 and *Lingle* to hold that virtually identical claims under the Minnesota Fraudulent Transfer Act must be preempted by the Railway Labor Act.[6] Although

[6]On this basis, the *Deford* Court also concluded that the state-law suit was removable to federal court, and criticized a contrary Third Circuit decision, *Railway Labor Executives Association* v. *Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988), as expressing an "unnecessarily

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the Eighth Circuit agrees with the Wisconsin Supreme Court that state fraudulent transfer statutes are "not substantive in nature," 867 F.2d at 1087, its holding is in stark conflict:

> [In *Lingle*, t]he Court stated that a retaliatory discharge claim is a substantive state claim, "which addresses purely factual questions pertaining to the conduct of the employee and the conduct and motivation of the employer." *Id.* 108 S.Ct. at 1882. Neither of these elements require a court to interpret the terms of a collective bargaining agreement. Thus, preemption was not warranted. The creditors rights asserted by Deford, by contrast, directly involve the interpretation of collective bargaining agreements.
>
> * * *
>
> In conclusion, Deford is essentially claiming that if the sale of rail lines from Soo Line to Wisconsin Central is not, in effect, unwound, the transaction will result in a breach of Soo Line's obligations under the existing collective bargaining agreements. Thus, by asserting state law claims, Deford seeks enforcement of the terms of the collective bargaining agreements. The fraudulent conveyance act serves only as an enforcement mechanism. We believe Deford is only trying to invoke a state law remedy in place of the mandatory and exclusive remedies of [federal law].

Id. at 1087-88. The Eighth Circuit is right and the Wisconsin Supreme Court is wrong. At least three other circuits have agreed with the Eighth Circuit's analysis and disagreed with that of the Wisconsin Supreme Court.[7]

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narrow" view of preemption principles in the removal context as applied to claims brought by a labor union to secure contractual benefits under the Pennsylvania Uniform Fraudulent Conveyance Act. *Deford*, 867 F.2d at 1086.

[7]*See Terwilliger* v. *Greyhound Lines, Inc.*, 1989 WL 88968 (6th Cir. Aug. 10, 1989) (state-law fraud claim is pre-empted where rights sought to be vindicated arise, as here, solely under the terms of a collective bargaining agreement; *Lingle* inapplicable because no state substantive

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Thus, although the conflict in rationales is most vividly spelled out in the Eighth Circuit's decision in *Deford*, 867 F.2d at 1086, it is quite clear that the specific question decided by the Wisconsin Supreme Court of the proper reach of Section 301 preemption would, on these facts, have been decided differently in any one of four federal courts of appeals.

II. Prompt Resolution Of This Conflict Is A Matter Of Great National Importance

Finally, not only is there a fundamental conflict on the question presented here, but prompt resolution of the conflict is a matter of great national importance with profound, *immediate* implications. The Wisconsin Supreme Court's decision allowing fraud-

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rights involved); *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989) (where state law would look to a collective bargaining agreement to assess expectations of privacy, and state-law did not "create a right that is *on its own terms* independent of [the] collective bargaining agreement" as in *Lingle*, state-law drug test challenge is pre-empted by Section 301) (emphasis added); *Gibson* v. *AT&T Technologies, Inc.*, 782 F.2d 686 (7th Cir.), *cert. denied*, 477 U.S. 905 (1986) (state-law fraud claim for willfully withholding information regarding labor contract benefits is pre-empted under *Allis-Chalmers*). *Cf. Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) (although free-standing, "extraneous promise concerning . . . future employment eligibility" is not preempted by Section 301, fraud claims addressing the "*contents*" of a labor contract are) (emphasis in original); *Newberry* v. *Pacific Racing Association*, 854 F.2d at 1142, 1150 (9th Cir. 1988) (state-law claims for breach of covenant of good faith and fair dealing and intentional infliction of emotional distress are pre-empted because resolution is dependent on analysis of the collective bargaining agreement).

See also Milne Employees Association v. *Sun Carriers*, 714 F. Supp. 1028 (N.D. Cal. 1989) (employee state-law action against former employer for fraudulently representing that trucking operations would remain open is pre-empted by Section 301 because claim is "inextricably intertwined" with collective bargaining agreement); *Brown* v. *Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1218 (N.D. Ill. 1988) (under *Caterpillar*, *Hechler* and *Allis-Chalmers*, claims for fraudulent conveyance by employee "creditors" under a labor contract are "obviously" pre-empted by Section 301).

ulent conveyance actions "will have statewide, as well as nationwide, impact on mergers and acquisitions." App. 39A. During 1988 there were 318 transactions, involving in excess of $42.9 billion, which were in the form of a leveraged buyout. *See Leveraged Buyout Market Survey*, Merger & Aquisitions 64 (May/June 1989).[8] If followed, the Wisconsin decision will also have dramatic impact on countless mine-run disputes that would also otherwise be "grist in the mills of the arbitrators." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960). The "central role of arbitration" in labor disputes, *Allis-Chalmers*, 417 U.S. at 219, will be undermined because parties to collective bargaining agreements now have, under Wisconsin's rule, the option of avoiding arbitration and invoking the standing to sue conferred by such agreements to obtain state-law, non-substantive judicial remedies to secure rights the agreements grant. However, "[t]he parties [do] not bargain for facts to be found by a court, but by an arbitrator . . . [and *t*]*his is especially true when it comes to formulating remedies.*" *United Paperworkers International Union* v. *Misco*, 484 U.S. 29, 52 (1987) (emphasis in original).

Moreover, the Wisconsin Supreme Court's decision will profoundly complicate both the administration of innumerable *exist-*

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[8]Statutes similar to Wisconsin's fraudulent conveyance statute have been adopted in 34 states. 7A U.L.A. 100, 120 (1989 Supp.). As the Wisconsin Court of Appeals recognized, *see* App. 39A, "[l]everaged buyouts are becoming more common, as is the use of the UFCA to prevent such buyouts. *See, e.g. United States* v. *Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir. 1986), *cert. denied, sub nom., McClellan Realty Co.* v. *United States*, 107 S. Ct. 3229 (1987)."

And, as in Wisconsin, see App. 21, the jurisdictions which have addressed the issue have concluded that such statutes do *not* supply a *substantive* cause of action. *E.g. A/S Kreditt Finans* v. *Cia Venetico De Navegacion*, 560 F. Supp. 705, 711 & nn.14-15 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1446 (3d Cir. 1984); *Clark* v. *Rossow*, 134 Ariz. 490, 657 P.2d 903, 904 (Ct. App. 1982); *Blumenthal* v. *Blumenthal*, 303 Mass. 275, 21 N.E.2d 244, 246 (1939).

ing national agreements and the negotiation of new ones. This case demonstrates the point. The IAM here sues on behalf of its locals located in both Illinois and Wisconsin. The Seventh Circuit and district courts sitting in Illinois (*see supra* note 7) reject the Wisconsin Court's view that state-law remedies may be invoked with respect to labor agreements. Therefore, depending upon whether the forum is state or federal, employees in Wisconsin will have different remedies under the same contact and, in all events, the remedies of employees located in Illinois (where a fraudulent conveyance statute has *not* been adopted) under the same contract will differ from those of employees located in Wisconsin. *Lucas Flour*, 369 U.S. at 103-4. Thus, until reversed, the Wisconsin Supreme Court's decision will needlessly complicate the negotiation and administration of new and existing labor contracts, creating tactical opportunities and incentives for forum shopping and other attempts to broaden the relief available under such contracts in countless circumstances.

Significantly, this Court can end this potential confusion and disruption without burdening its docket. Because the Wisconsin Supreme Court's decision so thoroughly misapprehends settled principles—in precisely the way it did in *Allis-Chalmers*—it would be entirely appropriate for the Court summarily to vacate the decision of the Wisconsin Supreme Court and remand with directions to dismiss the complaint.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari, summarily vacate the Wisconsin Supreme Court's decision, and remand with directions that the complaint be dismissed as preempted. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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September 20, 1989

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APPENDIX

No. 87-1784

STATE OF WISCONSIN : IN SUPREME COURT

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS,
IAM LOCAL 437, IAM LOCAL 710,
IAM DISTRICT 10, IAM DISTRICT 172,
Individually and as authorized
representatives of all
IAM EMPLOYEES OF
UNITED STATES CAN COMPANY,
CONTINENTAL CAN COMPANY,
CCC SERIES 200, INC.,
INTER-AMERICAN PACKAGING, INC., and
GP ACQUISITION COMPANY, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES CAN COMPANY,
a Georgia corporation,
CONTINENTAL CAN COMPANY, U.S.A., INC.,
a Delaware corporation,
CCC SERIES 200, INC.,
a Delaware corporation,
INTER-AMERICAN PACKAGING, INC.,
a Pennsylvania corporation,
GP ACQUISITION COMPANY, INC.,
a Pennsylvania corporation, and
JOHN DOE'S 1-100,
collectively referring to the banks,
and other lenders participating in
the financing of the acquisition of
Continental Can, packaging sector by
United States Can Company,

Defendants-Respondents.

APPEAL from a judgment of the Circuit Court for Racine County, STEPHEN A. SIMANEK, Circuit Judge. *Reversed and remanded.*

HEFFERNAN, CHIEF JUSTICE. This is an appeal on certification of the court of appeals from a judgment of the circuit court for Racine county, which dismissed the complaint of the International Association of Machinists & Aerospace Workers (IAM), some of its local unions, and, in a represented capacity, all the IAM employees of those locals brought against United States Can Company and Continental Can Company. We reverse and remand for further proceedings.[1]

The issue certified to us by the court of appeals was stated as:

"Whether an action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by sec. 301 of the Labor Management Relations Act when brought by a union and employees against an employer."

Our response to this certified question must be: No. We conclude that this particular action involves only state law. The action is not preempted by the Labor Management Relations Act (LMRA).

Because the facts determine the application of the law, we recite them in some detail. The United States Can Company in the spring of 1987 agreed to buy the general packaging division of Continental Can Company in a highly leveraged buyout which, it is alleged, would encumber the assets of the packaging division with a debt of sixty-five million dollars, *i.e.*, the purchasers would finance their acquisition primarily by the pledge to lenders of the assets being acquired.

The plaintiffs are the International Association, its local unions, and the union employees of the packaging division plants

[1]Also taken on certification was an appeal from an order which denied IAM's motion to set aside the original dismissal. Because we conclude that the complaint was improperly dismissed, we need not consider the subsequent motion and order separately appealed by IAM.

located in Racine, Wisconsin, and Danville, Illinois. We refer to the plaintiffs herein as "unions." The defendants are the United States Can Company, the acquiring corporation, the Continental Can Company, whose packaging division is being acquired, and an acquisition company which has been established apparently to manage takeovers such as this one. Also joined as defendants are the lending institutions which would finance the takeover. We refer to all of them as "companies."

The unions for some time, not specifically disclosed in the pleadings, have been the bargaining representatives of the employees and are parties to collective-bargaining agreements on behalf of the workers with the Continental Can Company.

Because the unions assert that the buyout will leave a financially impaired employer, they have brought an action under Wisconsin law, ch. 242, Stats., the Uniform Fraudulent Conveyance Act (UFCA)[2] in a Wisconsin court to declare the transfer a fraudulent one under the provisions of the act and to enjoin the defendants "from selling, disposing, transferring or otherwise further conveying or encumbering any of the assets" that may be acquired by the transferee company. Other relief, including the appointment of a receiver to protect the employees and other creditors, is sought. No damages are asked for.

The essence of their complaint is that the terms of the buyout without fair consideration will leave the packaging division insolvent or inadequately capitalized, thus resulting in a constructive fraud on creditors under UFCA. Intentional fraud is also alleged.

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[2]The unions asserted claims under secs. 242.04, 242.05, and 242.07, Stats., which provide:

> 242.04 Contract producing insolvency, fraudulent. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

(Footnote continued on following page)

The unions claim they are proper plaintiffs and have a creditor status by reason of Continental Can Company's obligations to them of $19,950,000 in matured or unmatured claims. While counsel at oral argument was unable to respond with precision to the components of this claimed obligation, the complaint makes clear that the genesis of the relationship is the employer-employee status, which is defined by one or more collective-bargaining agreements. It is asserted that the obligation of the employer consists of matured and unmatured claims for "wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits." The unions, as unions, separately assert that they are creditors of the employers for dues checkoffs.

After the complaint was served, the companies responded by moving to dismiss pursuant to sec. 802.06(3), Stats., on the ground that "this action is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185."[3]

(Footnote continued from previous page)

242.05 Other specifications of legal fraud. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuances of such business or transaction without regard to his actual intent.

242.07 Fraud in fact. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors.

[3]29 U.S.C. sec. 185(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The trial judge, in deciding this motion, appropriately accepted the facts alleged in the complaint as correct; and it is to these facts, recited above, to which the parties have resorted in discussing this litigation.

The circuit judge reasoned that whatever rights the unions had derived completely from their collective-bargaining agreements and, therefore, any action brought on that creditor status was preempted by the LMRA.[4] He said in his opinion from the bench that "The claim is founded directly on rights created by the collective bargaining agreement." He stated the "resolution of the dispute under 242 will require this Court to evaluate and interpret a collective bargaining agreement."

After reviewing various decisions of the United States Supreme Court, he concluded by stating:

> "[A]pplying the rationale contained in the cases cited will require this Court to accept the federal dictate—the federal law dictate that a state court cannot step in and interpret and decide this case in this forum."

He stated he did not have "jurisdiction" to determine the dispute because it would require interpretation of the collective-bargaining agreements; and, therefore, the claim was dismissed.

The appeal by the unions from this order followed and was subsequently certified to this court.

It appears to us that the resolution of this case hinges on the proper characterization of the nature of the plaintiffs' claim. If

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[4]We note that the circuit judge repeatedly typified preemption under LMRA as preemption of the state forum. Preemption, if required under sec. 301(a), is preemption of state law. The state forum may be utilized for the litigation of a sec. 301(a) action if appropriate federal law is applied. See *Charles Dowd Box Co., Inc., v. Courtney,* 368 U.S. 502 (1962), and *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962), both of which hold that a state forum has jurisdiction but incompatible principles of state law must give way to the principles of federal labor law.

the claim substantially implicates rights governed by sec. 301 under LMRA, federal law must be applied. If the claim is properly characterized as a state creditor's action to obtain the remedies afforded by UFCA and requires no substantial interpretation of the collective-bargaining agreement as provided by Wisconsin statutes to protect creditors, Wisconsin law is applicable.

The mine-run case subject to preemption "is a contract claim in which a party to the collective-bargaining agreement expressly asserts that a provision of the agreement has been violated." *Electrical Workers v. Hechler,* 481 U.S. 851, 857 (1987). The case before us does not have that simplistic characteristic.

We first note the posture of the claim that the unions are creditors as defined by UFCA. The unions make that assertion for their members and for themselves. Under the procedural posture of the case, all parties agree that the allegations of the complaint must be taken as true. Also, it should be noted that one of the principal defendants, United States Can Company, denies any information on which it could form a belief as to the creditor status of the plaintiffs. Continental Can Company, the erstwhile employer, denies that any of the plaintiffs are creditors except for *de minimis* sums. Both of the principal defendants contend that what is relevant is not just that plaintiffs are, or could be, creditors, but that in any event they are creditors only by reason of the preexisting collective-bargaining agreements.

Essentially, the argument of each side relies upon United States Supreme Court cases. The unions, while recognizing the preemption of federal law in contract disputes over collective-bargaining agreements, point to the exceptions that appear both explicitly and implicitly in United States Supreme Court decisions that demonstrate that not all controversies that arise between parties to a collective-bargaining agreement are sec. 301 cases preempted by federal law. They conclude this is not a sec. 301 case.

The companies adopt the general proposition that any claims that are founded on rights created by collective-bargaining agreements are preempted by federal labor law. They argue that whatever rights the unions have as creditors arise out of collective-bargaining agreements.

The question of whether a claim exclusively involves state law or whether it implicates federal law and thus is subject to preemption is a matter of law. Accordingly, we need not give special deference to the determination of the trial judge. The controlling question of law is, however, not a simple one, and its answer is dependent upon federal law as stated by the United States Supreme Court and by other federal courts to the extent that they appear to speak definitively on this question of the preemptive effect of sec. 301. See *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 214 (1985).

The federal law is clear that, where there is a sec. 301 claim, federal substantive law (irrespective of the forum) must control. *Teamsters Local v. Lucas Flour Co.,* 369 U.S. 95, 103 (1962), rules out the application of incompatible state law and mandates that federal law must prevail in a sec. 301 case, stating:

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Thus, *Lucas* makes it clear that individual contract terms must have consistent meanings and that only uniform federal law is likely to obtain that result.[5]

The 1985 case of *Allis-Chalmers,* reversing a judgment of this court, 116 Wis. 2d 559, 342 N.W. 2d 699 (1984), is highly inform-

[5]In *Lucas,* the contract term under consideration was a compulsory-arbitration provision. The United States Supreme Court held that the Washington Supreme Court not only had jurisdiction of the sec. 301 claim, but also reached the correct ultimate result.

ative and emphasizes that not all disputes between parties to a collective-bargaining agreement are to be governed by federal law. The actual matter at issue—whether sec. 301 of the LMRA preempts the state court action for bad-faith delay in making disability-benefit payments—was, however, decided in favor of preemption contrary to the decision of this court.

Allis-Chalmers attempted to summarize some of the principles of sec. 301 preemption. Relying on *Lucas Flour, supra, Allis-Chalmers* stated that:

> "[A] suit in state court alleging a violation of a provision of a labor contract must be brought under sec. 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law." At 210.

It found that, because the collective-bargaining agreement itself must be interpreted in terms of "good faith," the state could not add the gloss of breach-of-a-state-tort-duty to the collective-bargaining contract and, therefore, there was preemption.

Allis-Chalmers went on to limit the possible scope of its rule by stating:

> "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by sec. 301 or other provisions of the federal labor law." At 211.

It further stated:

> "Clearly sec. 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of sec. 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." At 212.

The *Allis-Chalmers* court also said, in effect, that rights conferred by state law that are nonnegotiable in a collective-bargaining agreement are not subject to preemption.

In respect to the dispute before it, the United States Supreme Court concluded that the duty of good faith was already an implicit condition of the collective-bargaining agreement. That agreement required insurance coverage by the employer, and hence the question of good faith was "tightly bound with questions of contract interpretation that must be left to federal law." At 216.

The court specifically declined in *Allis-Chalmers* to pass judgment "on whether an independent, nonnegotiable, state-imposed duty which does not create similar problems of contract interpretation would be pre-empted under similar circumstances." At 217, n. 11. As pointed out above, however, a collective-bargaining agreement cannot provide for terms illegal under general state law.

It summarized the tenor of its holding, stating:

> "It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether this suit also would have been pre-empted by other federal laws governing employment or benefit plans. Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by sec. 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis. We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a sec. 301 claim, see *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law." At 220.

We believe that *Allis-Chalmers* substantially "said it all" in respect to preemption principles applicable to sec. 301. Cases

subsequent to *Allis-Chalmers* have, however, "fleshed out" the general principles set forth therein.

In *Electrical Workers v. Hechler,* 481 U.S. 851 (1987), the principles of *Allis-Chalmers* were applied without significant modification. There, the employee claimed that the union had breached its duty to provide her a safe workplace. The Supreme Court noted that, in the absence of an agreement, the duty would devolve upon the employer and, hence, the determination of whether the duty fell upon the union required interpretation of the collective-bargaining agreement—a process, the court said, that must yield to the application of uniform interpretations of the federal law. *Hechler* reiterated the rule of *Allis-Chalmers* that there was preemption when the resolution of a state claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract. *Hechler* at 859.

In the same court term as *Hechler,* the Supreme Court, in *Caterpillar Inc. v. Williams,* 482 U.S. 386 (1987), decided that, where employees had separate employment contracts and their rights were not dependent on the interpretation or application of the collective-bargaining contracts, the complaint for enforcement did not require evaluation under sec. 301 and was not removable to federal court.

While *Caterpillar* is not controlling in the instant case, its language is instructive. The Court in *Caterpillar,* relying on *Allis-Chalmers,* stated:

> "[A] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." At 396.
>
> In contrast, the Court pointed out that:
>
> "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " At 394.

It could be asserted that *Caterpillar* expands the *Lucas Flour* test of preemption that arguably requires an express assertion that a collective-bargaining agreement has been violated, and supplants it with a test merely requiring that the claim be "founded directly on rights created by collective-bargaining agreements." At 394.

We are not persuaded that the test is different than that utilized in predecessor cases. The verbiage is slightly at variance, but the significance of that variance is not made apparent by the Court in *Caterpillar*. It is the facts there that constitute a significant variance.

That *Caterpillar* does not alter the previously stated rule is corroborated by the recent case of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. , 108 S. Ct. 1877 (1988). There, the majority relied on the pre-*Caterpillar* formula that preemption turns on whether the state-law claim can be resolved without interpreting the collective-bargaining agreement. Lingle traced the history of sec. 301 preemption from *Charles Dowd Box Co., supra, Lucas Flour, supra,* and *Allis-Chalmers, supra,* and concluded that:

> "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute." At 1881.

Thus, it appears that the proper test is not esoteric, but practical—does the adjudication of the state-law claim depend on the interpretation of the collective-bargaining agreement?

Even so, recent precedent indicates that a court does not risk preemption merely because some aspects of the collective-bargaining agreement are examined in determining the state claim.

In *Lingle* itself, the Court pointed out that a finding of parallelism of some provisions of the collective-bargaining agreement with facts necessary to resolve a state-law claim does not necessarily compel sec. 301 preemption.

An opinion of the Court of Appeals for the Second Circuit in *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2nd Cir. 1987), was cited with approval in *Lingle*, at 1885. That case held the fact that the terms of the collective-bargaining agreement were relevant in furnishing the basis for making an appropriate award of damages to an employee asserting a state claim did not require a finding of preemption. It was held that Baldracchi's right not to be wrongfully discharged for filing a worker's compensation claim was not dependent upon the collective-bargaining agreement, although, clearly, the measure of her redress—the damages—was dependent upon wages established by that agreement. *Baldracchi* referred to language in *Allis-Chalmers* that emphasized that "tangential" reference, or even dependence upon the terms of a collective-bargaining agreement for some purposes, did not impel a conclusion of preemption.

Baldracchi also seizes upon other points in the Supreme Court opinions referred to herein, *e.g.*, that some rights arising under state law are nonnegotiable (see *Allis-Chalmers* at 213 and 217 n. 11) and therefore cannot be inquired into by the federal law of labor contracts. *Baldracchi* points out that the right to file a worker's compensation claim is one of those rights. *Baldracchi* states that, if LMRA is interpreted to deny employees in a collective-bargaining unit a right to a state remedy enjoyed by employees who are not represented in collective-bargaining units, the policy of the federal labor act is turned "on its head." 814 F.2d at 107.

From these cases, we derive fairly simple principles that, as evidenced by divergent opinions of various federal cases, are not simple of application. We deem the basic and controlling principles to be these: A state court has concurrent jurisdiction over a

sec. 301 claim, subject to removal to a federal court; but, in any forum, a sec. 301 claim is always subject to the application of federal labor law.

If the claim does not require substantial interpretation of a collective-bargaining agreement, the application of federal law is not required. In determining whether the claim is preempted by sec. 301, the Supreme Court has stated the following guidelines:

> A suit brought in a state court directly alleging a violation of a labor contract must be brought under sec. 301 and resolved by reference to federal labor law. Where the particular dispute can only be resolved by interpretation of the collective-bargaining agreement, it is a claim under sec. 301 and is resolvable only by the federal labor law; however, there must be more than a "tangential" reliance upon the collective-bargaining agreement. The dispute in question or the issues for its resolution must be "tightly bound" to the interpretation of the collective-bargaining agreement. When resolution of the state claim is substantially dependent upon the analysis of terms in a collective-bargaining agreement, it must be treated as a sec. 301 claim or dismissed; or, under another formulation of the same rule, a state-law claim that is "founded" directly on the collective-bargaining agreement is a sec. 301 claim requiring resolution by federal labor law.

Having these "principles" in mind, we must determine their effect on the case before us. Using these principles, we reach the conclusion that this is not a sec. 301 case subject to preemption. It is an action brought to assert a state-law right to set aside what is alleged to be a fraudulent conveyance. Justice Stevens in footnote 12 of *Lingle,* at 1885—a unanimous decision—stressed that the collective-bargaining agreement might well be the predicate for determination of the extent or scope of the remedy to which a worker might be entitled under state law and, to the extent that the collective-bargaining agreement needed interpretation, federal law would govern that interpretation, but that use of federal law did not require preemption of the state claim.

In the instant case, the plaintiff unions stress that the terms of a collective-bargaining agreement need not be interpreted to give them the remedy sought under UFCA. They merely need be creditors—present or potential, contingent or matured—and no threshold amount is required. Whether their qualification as creditors can be proved remains to be seen; but, under the posture of this case, where the assertion is that the plaintiffs are creditors, that pleaded fact must be assumed to be true.

DeFord v. Soo Line Railroad Co., 867 F.2d 1080 (8th Cir. 1989), considered whether a Minnesota UFCA action challenging a leveraged buyout was preempted by the Railway Labor Act. The court relied upon the language of *Allis-Chalmers* and concluded that the Minnesota state UFCA claim was entirely dependent on rights afforded by the preexisting collective-bargaining agreement and was, therefore, preempted. Chief Judge Donald Lay, dissenting, relied upon footnote 12 in *Lingle*, referred to above, and stated:

> "Interpretation of the collective bargaining agreement is required only to determine standing as a creditor, and to determine the amount of damages. The state statute creates an entitlement independent of the collective bargaining agreement, and is not preempted by the RLA." At 12.

We conclude that the analysis of Chief Judge Lay is the appropriate one under the guidelines of the Supreme Court itself. A creditor is defined by UFCA, sec. 242.01(3), Stats.: " 'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Creditors under UFCA include holders of unreduced tort claims (*Marcus v. Kane,* 18 F.2d 722 (2nd Cir. 1927)), and employees with claims against their employer for services rendered (*Pallott v. LaSalle Roofing & Shingle Co.,* 254 N.Y.S. 748 (1931)). Both actual and constructive fraud are addressed by the act. While sec. 242.07 deals with conveyances that involve actual intent to defraud, sec. 242.04 covers conveyances where insolvency

results, and sec. 242.05 covers conveyances that leave a business with unreasonably small capital. Fraudulent conveyances may be blocked or annulled as provided by secs. 242.09 and 242.10. Constructive fraud claims under UFCA must also deal with the issue of whether the conveyances were made for fair consideration. *In re Bossell, Van Vechten & Chapman,* 30 Wis. 2d 20, 30, 139 N.W. 2d 639 (1966).

The companies emphasize that, under *Running v. Widdes,* 52 Wis. 2d 254, 190 N.W. 2d 169 (1971), UFCA is a statute that confers no substantive rights, but rather confers remedies upon creditors with existing substantive rights. The assertion is true but irrelevant. We do not see the plaintiffs' complaint as asserting that UFCA gives them creditor status. Rather, the claim is that they are creditors under the collective-bargaining agreements and are seeking to have the same remedies that are afforded to other creditors.[6]

As stated under the somewhat different, but pertinent, circumstances of *Baldracchi, supra,* it would be strange to deny workers in collective-bargaining units the benefits of the remedies afforded all other creditors by UFCA just because they are organized laborers. The most significant aspect of *Running v. Widdes* is given no emphasis by the companies herein. The opinion stated that the policy of the law is to benefit creditors and to give them a remedy in the event of fraudulent transfers and, as a remedial statute, UFCA should be liberally construed "to accomplish its purpose of giving speedy relief against a fraudulent debtor." At 259.

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[6]As stated above, their assertion of creditor status under the procedural posture of this case is not subject to question. Even the answer of Continental Can acknowledges that the plaintiffs may be creditors, but the answer brushes aside the legal significance of that status as a *de minimis* one. We need not address the question of whether a claimant whose claim is small can be barred from a plaintiff's status in a creditor's action to set aside a fraudulent conveyance. Suffice it to say no legal basis for that distinction is argued, nor need it be, for under the pleadings here the plaintiffs are creditors.

We see no force in the argument that UFCA is inapplicable because it confers no substantive rights. It does not. It is not intended to. What plaintiffs seek by use of UFCA is not the substantive right of a claim as creditor, but a remedy to assist in the satisfaction of that substantive claim.

We note that the case of *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3rd Cir. 1986), validates the use of a state UFCA proceeding by a creditor to challenge a leveraged buyout. The United States of America was a creditor for income taxes in the *Tabor* case, where there was a conveyance of a major coal producer's assets and where the transaction jeopardized the ability of the United States to collect taxes. The court found it was appropriate to apply Pennsylvania's fraudulent conveyance act for the protection of creditors to set aside the leveraged buyout. Labor unions and their members should not be denied this same remedial aspect of state law unless to afford such remedy in some way impinges upon, or interferes with, the underlying and paramount philosophy of LMRA that the same federal legal standards be applied nationally to the interpretation and application of collective-bargaining agreements. In this case, there is no evidence of any impingement upon basic philosophies of LMRA.

We also consider other language appearing in several of the opinions of the United States Supreme Court that impels the conclusion we reach here.

It is rather obvious that, if the result sought to be achieved by the state claim or action cannot be the subject of any collective-bargaining agreement, it is nonnegotiable. Hence, the assertion of such claim can have no effect on labor negotiations or on collective-bargaining agreements. See *Allis-Chalmers* at 211, 212. It would be difficult to assert that an agreement to submit to, or be victimized by, fraudulent conveyors is an agreement that could be negotiated legally under any system of law by parties to a collective-bargaining agreement. Certainly, the rights under

UFCA are not rights that a party to this litigation contends may be bargained away. *Allis-Chalmers* at 212 noted that sec. 301 does not grant parties to a collective-bargaining agreement the ability to contract for what is illegal under the state law or to forego rights or obligations under state law that are independent of the labor contract. We do not see the defendant companies claiming that the right to assert the remedies of UFCA have been bargained away or can be bargained away in any collective-bargaining agreement. More to the point, the above language of *Allis-Chalmers* makes it clear that the right to use UFCA need not hinge upon any possible interpretation of a collective-bargaining agreement. *Allis-Chalmers,* at 217, made a significant point in asserting that parties to a labor contract are free to bargain in respect to what constitutes "good faith" in an insurance agreement. If effect (*sic*), the Supreme Court concluded that, although "good faith" was a concept of state tort law, it was bargainable and negotiable in a collective-bargaining agreement because it involved terms and conditions in respect to the timeliness and methods of insurance benefit payments agreed upon in the collective-bargaining agreement.

It could be argued that a conveyance which is denominated as a constructive fraud only by reason of its consequences—such as undercapitalization or insolvency—could be an appropriate subject for labor negotiations. Such fraud after all is only of a type that is presumed in law. The fraud alleged in the third count of the complaint of the unions is brought under the provisions of sec. 242.07, Stats., *Fraud in fact.* The allegation is one of intentional fraud. Such conduct is proscribed by law and cannot be negotiable. The purpose of a uniform federal labor law cannot be furthered by any ratiocination that actual fraud is an appropriate or negotiable subject of a collective-bargaining agreement.

The language of Judge Richard Posner in the recent case of *Air Line Pilots Assoc. International v. UAL Corporation, International Association of Machinists & Aerospace Workers,* Nos. 83-3308, 88-

3377, and 88-3387 (7th Cir. 1989), is by analogy appropriate to the use, in this case, of UFCA to control alleged illegal aspects of a corporate takeover. The Seventh Circuit case involved the applicability of a Delaware anti-takeover law, which was invoked to avoid a hostile leveraged buyout. It was claimed that the law of the State of Delaware was preempted by the Railway Labor Act, an act that has been interpreted to have as much preemptive effect as sec. 301 actions under LMRA. The Seventh Circuit said the Delaware law was not preempted and stated that preemption would be contrary to public policy and that an anti-takeover clause in a collective-bargaining agreement was a nullity. Judge Posner wrote:

> "Although preemption does not seem required to further the objectives of federal law, it could have a catastrophic effect on the efforts of states to regulate takeovers, and this consideration is germane since, realistically, a judgment about preemption requires a weighing of federal and state interests. See, e.g., Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669, 676 (1983); Belknap, Inc. v. Kale, supra, 463 U.S. at 498. Any firm that had a collective-bargaining agreement with a significant fraction of its work force could adopt anti-takeover measures with complete impunity, simply by writing them into the collective-bargaining agreement. Unionized firms would be immune to hostile takeovers, if, as is common, [*24] the union feared that a buyer of the company would seek to economize on its labor costs by renegotiating the company's collective-bargaining agreements or even by selling off the company's assets to purchasers who would take free of any obligation under such agreements. For us to create in the name of preemption so enormous a loophole in state regulation, without any evidence that the loophole is necessary to protect the objectives of federal labor law, would be reckless. Like the criminal law, the regulation of corporations is, as the Supreme Court reminded us in the CTS case, a matter of primary state responsibility. See 107 S. Ct. at 1550-52; see also Cort v. Ash, 422 U.S. 66, 84-85 (1975). In such areas the presumption is against federal preemption. California v.

ABC American Corp., 57 U.S.L.W., 4425, 4427 (S. Ct. April 18, 1989). And presumption or not, we do not think that the framers of the Railway Labor Act meant to deal the body blow to state regulation of corporations that a finding of preemption in this case would administer." 1989 U.S. App. Lexis 6521, 21.

In a vein similar to that of Judge Posner's opinion, we have already explained that these claims require only tangential reference to the collective-bargaining agreement. No substantial interpretation is required. On the other hand, we conclude that the rationale for the objection to UFCA in this case on the ground that it might interfere with the federal labor law goal of uniformity is hard to understand. It would appear that the suppression of fraud, presumed or factual, even in the civil sense, is so closely related to the criminal law that the state has a substantial interest that should not be tampered with unless the paramount interest of the federal government in uniform labor law in the particular case is demonstrated.[7] It would appear that an area of state law such as that which we have under consideration here—fraudulent conveyances—is one in which the presumption should be against federal preemption.

In respect to the arguments of the defendants that the rights afforded by UFCA are remedial only, we respond by pointing out that the rights, because they are remedial, are significant ones in the panoply of most states' arsenals against those who would defraud creditors. A substantial state interest is at stake that should not be displaced upon a mere assertion that the uniformity of federal labor laws will be put in jeopardy. Defrauded creditors' rights should not be allowed to go

[7]We point out that we do not balance the importance, in terms of policy, of the state claim against the preemptive effect of federal law. As *Allis-Chalmers* at 214, n. 8, makes clear, balancing or weighing of the comparative importance of state law is irrelevant and inappropriate. Rather, we state that an important state value should not be discarded lightly unless there is preemption under the federal law.

unvindicated by merely asserting that the use of UFCA raises the spectre of non-uniform interpretations of collective-bargaining agreements. There is no showing of such a consequence here. Under the facts of this case, as well pleaded in the complaint, the unions and their members are creditors and are entitled to assert the remedy afforded by UFCA.

In conclusion, then, we hold that the cause of action asserted is a state claim, not a sec. 301 claim subject to preemption. There is no "substantial" dependency on a collective-bargaining agreement. The right claimed at the most requires only "tangential" reference to the collective-bargaining agreement. The rights arise under the state statute, not under any collective-bargaining agreement. There is no "intertwining." The state claim arises under an entirely separate aggregation of rights not even remotely concerned with labor law—state or federal. Nor are the rights being asserted in any way founded upon a substantial interpretation of a collective-bargaining agreement, nor, as we point out, could they be. The unions are not seeking directly to enforce their collectively-bargained rights to wages or other benefits. Rather, they seek to utilize UFCA to prevent their *debtor* from putting itself in a posture that may fundamentally compromise its ability to meet its obligations to its creditors; and there has been no showing by the companies that this claim will require substantial interpretation of the collective-bargaining agreement or that it will impinge upon the acknowledged value in having uniform federal labor law. There is simply no logical reason for this attempt to preempt an important area of state creditor law.

The only question of any real importance at this stage of the litigation is the unions' creditor status. Given the broad definition of "creditor" that appears in sec. 242.01(3),[8] it cannot be doubted

[8] "242.01(3) 'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

that the plaintiffs here have the standing and the factual posture under the complaint to bring this state action.

While their status as creditors in fact may be challenged upon remand, whether that status arose as the result of obligations to them under the collective-bargaining agreement is immaterial. It is the status that counts, not its origin. To determine whether the unions and their members are creditors, simpliciter, is a perfunctory exercise not dependent upon any substantial interpretation of collective-bargaining agreements. It is a determination that has no dependency upon the application of federal labor law.

Upon remand, additional issues will be posed: Whether the company has rendered itself insolvent by the transaction, whether it will be unreasonably undercapitalized, whether the consideration for the transfer was fair, and whether there was, as alleged, constructive and actual fraud perpetrated on the creditors. At the most, however, we anticipate that any references in future stages of this litigation to collective-bargaining agreements will be "tangential." The claim is not predicated or dependent upon any provision of the agreement. What the unions and their employees seek is an injunction to set aside or avert what is alleged to be a fraudulent transaction. While this may involve complicated arithmetical calculations and accounting procedures, we do not see a possibility that, for the purposes of the remedy sought to be afforded by ch. 242, Stats. (UFCA), the collective-bargaining agreement need be substantially considered. Federal preemption by the application of federal labor law under sec. 301 of LMRA is inappropriate. This is not a dispute that, in its present state-claim posture, implicates federal labor law.

By the Court.—Judgment reversed and cause remanded.

No. 87-1784

STATE OF WISCONSIN : IN SUPREME COURT

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS,
IAM LOCAL 437, IAM LOCAL 710,
IAM DISTRICT 10, IAM DISTRICT 172,
Individually and as authorized
representatives of all
IAM EMPLOYEES OF
UNITED STATES CAN COMPANY,
CONTINENTAL CAN COMPANY,
CCC SERIES 200, INC.,
INTER-AMERICAN PACKAGING, INC., and
GP ACQUISITION COMPANY, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES CAN COMPANY,
a Georgia corporation,
CONTINENTAL CAN COMPANY, U.S.A., INC.,
a Delaware corporation,
CCC SERIES 200, INC.,
a Delaware corporation,
INTER-AMERICAN PACKAGING, INC.,
a Pennsylvania corporation,
GP ACQUISITION COMPANY, INC.,
a Pennsylvania corporation, and
JOHN DOE'S 1-100,
collectively referring to the banks,
and other lenders participating in
the financing of the acquisition of
Continental Can, packaging sector by
United States Can Company,

Defendants-Respondents.

LOUIS J. CECI, J. (*Dissenting.*) I dissent. I would find that the unions' cause of action under the Uniform Fraudulent Convey-

ance Act, ch. 242, Stats. (1985-86), is preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, because resolution of the unions' cause of action before this court will require substantial interpretation of the collective bargaining agreement between the unions and Continental Can Company (Continental). I am at a loss to understand how the majority could conclude otherwise.

Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 451 (1957), the United States Supreme Court held that § 301 not only provides federal court jurisdiction over controversies involving collective bargaining agreements but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *See also Lingle v. Norge Division of Magic Chef, Inc.,* 108 S.Ct. 1877, 1880 (1988). The Court later concluded that state courts have concurrent jurisdiction over § 301 claims. *Charles Dowd Box Co., Inc. v. Courtney,* 368 U.S. 502 (1962). However, state as well as federal courts must apply federal law in deciding such claims. *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 102 (1962); *Lingle,* 108 S.Ct. at 1880 n. 2.

In *Lucas Flour,* the Court was confronted with the issue of whether a collective bargaining agreement implicitly prohibited a strike that had been called by the union. The Washington Supreme Court had answered that question by applying state law rules of contract interpretation. *Lucas Flour,* 369 U.S. at 102. The

Court rejected that approach and held that § 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective bargaining agreements because "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 103.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985), the Court considered the issue of whether § 301 of the LMRA preempted a state law tort action for bad-faith delay in making disability benefit payments due under a collective bargaining agreement. The Court held that "[t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." *Id.* at 211. Consequently, since reference to the collective bargaining agreement as to the manner in which a benefit claim would be handled would necessarily have been relevant to any allegation that the claim was handled in a dilatory manner, the Court held that § 301 preempted the application of the state law tort remedy. *Id.* at 218-19. The Court concluded by holding "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, *see Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law." *Id.* at 220; *see also Lingle*, 108 S.Ct. at 1883-84 n. 10; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987).

Therefore, § 301 of the LMRA preempts state law claims which are founded directly on rights created by the collective bargaining agreements or which are substantially dependent upon analysis of a collective bargaining agreement. *Caterpillar*, 482 U.S. at 394; *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 859 n. 3 (1987); *Evans v. Einhorn*, 855

F.2d 1245, 1251 (7th Cir. 1988); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1396 (9th Cir. 1988). If the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the application of state law is preempted. *Lingle*, 108 S.Ct. at 1881.

In the case before this court, the unions' complaint expressly sets out that the debts the unions are seeking to secure exist solely because of the collective bargaining agreement. Paragraphs 1 and 3 of the complaint state in part:

> 1. . . . Plaintiffs are creditors of defendants with respect to wages, employee benefits, pension and welfare benefits, collective bargaining dues 'check-offs', and other matured and unmatured claims, pursuant to the collective bargaining agreement between the IAM and the defendants. . . .
>
> . . .
>
> 3. The IAM employees of the defendants are creditors of defendants *under the terms of the IAM Continental collective bargaining agreement in the approximate amount of $19,950,000.* This indebtedness is comprised of matured as well as unmatured claims over the life of plaintiffs' current collective bargaining agreement for wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits, as well as claims asserted in various grievance and arbitration proceedings, *all owed to the employees pursuant to the collective bargaining agreement.*

(Emphasis added.) The unions' complaint also sets out the basis of its claims. Paragraphs 21, 25, and 27 of the complaint state:

> 21. As a result of defendant U.S. Can's acquisition of the Continental packaging sector pursuant to the merger transaction between the parties, defendants have made and will make conveyances and incur obligations which will render the surviving entity insolvent within the meaning of Section 4 of the Uniform Fraudulent Conveyance Act, Wis. Stat. § 242.04. These conveyances and obligations, as more fully

set forth in paragraphs 11 through 17, *supra,* will render the merged entity insolvent in that the fair saleable value of the available, unemcumbered post-merger assets will be far less than the amount that the post-merger enterprise will need to pay its probable liabilities or its existing debts as they become absolute and matured.

. . .

25. The transaction which defendants have completed, or are about to complete, involves conveyances and obligations on the part of defendants which will leave the surviving merged entity severely and unreasonably undercapitalized within the meaning of § 5 of the Uniform Fraudulent Conveyance Act, Wis. Stat. § 242.05. The property remaining in the surviving entity's hands upon completion of the merger transaction will be so encumbered by pledges, liens, and security interests that the surviving entity will be left with effectively no working capital, but will have insurmountable debt.

. . .

27. The conveyances and transfers which defendants have completed, or are about to complete, as part of the U.S. Can acquisition of the Continental packaging sector have been made to hinder, delay, or defraud plaintiffs, who are both present and future creditors of defendants, within the meaning of Section 7 of the Uniform Fraudulent Conveyance Act, Wis. Stat. § 242.07.

Consequently, in order to determine whether U.S. Can's acquisition of Continental's packaging division pursuant to the merger transaction between the parties will render the surviving entity insolvent, a circuit court would have to determine, under § 242.04, Stats., whether the present fair salable value of Continental's assets is less than the amount that will be required to pay Continental's liability on its existing debts as they become absolute and matured. Furthermore, in order to determine whether U.S. Can's acquisition of Continental's packaging division pursuant to the merger transaction between the parties would leave the

surviving entity severely and unreasonably undercapitalized under § 242.05, Stats., the court would have to determine whether the property remaining after the conveyance is an unreasonably small capital. Finally, in order to determine whether U.S. Can's acquisition of Continental's packaging division pursuant to the merger transaction between the parties was made to hinder, delay, or defraud the unions under § 242.07, Stats., the court would have to determine the companies' actual intent.

In order to resolve these issues, the court would have to balance Continental's assets against its liabilities. To determine Continental's liabilities, the court would have to interpret the terms of the collective bargaining agreement to determine if the unions' claim of $19,950,000 in matured and unmatured claims over the life of the unions' current collective bargaining agreement for wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits as well as claims asserted in various grievance and arbitration proceedings is correct. Making such a determination would *undoubtedly* force the court to construe the meaning and import of the numerous provisions of the collective bargaining agreement in light of the provisions and definitions of the Uniform Fraudulent Conveyance Act.[1] Such substantial interpretation of the collective bargaining agreement by a state court to determine rights under state law would result in precisely the outcome that the doctrine of preemption under § 301 is supposed to prevent.

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[1]I note that:

"A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. See *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 106 (CA2 1987). Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement

(Footnote continued on following page)

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

Lucas Flour, 369 U.S. at 103-104.

In *Brown v. Keystone Consolidated Industries, Inc.,* 680 F. Supp. 1212, 1216 (N.D. Ill., 1988), the United States District Court was confronted with a situation similar to the one presently before this court. Keystone Consolidated Industries, Inc. (Keystone), in order to alleviate its fiscal woes, allegedly conspired with Frank L. Corral (Corral) to circumvent Keystone's Chicago Heights Steel Division's (CHS Division) collective bargaining agreement and its pension agreement with its employees by executing a sham transaction in which Keystone would sell its CHS Division to a purported "independent buyer" who in reality was Corral, CHS Division's vice president and general manager. In

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(Footnote continued from previous page)

> and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the *separate* state law analysis would not be thereby pre-empted."

Lingle, 108 S.Ct. at 1885 n. 12 (emphasis added).

However, in the case before this court, the state law claim is not separate because liability, not just damages, is decided by reference to the collective bargaining agreement. The companies' liability under state law is decided by reference to the collective bargaining agreement. As a result, *Baldracchi* is not applicable to the situation before this court.

this manner, Keystone would allegedly continue to realize profits from the operation of the CHS Division business without being saddled with the obligations under its collective bargaining and pension agreements. *Id.*

The plaintiffs, thirty-five former employees of CHS Division, alleged in part that they were preexisting creditors of Keystone in that Keystone owed the plaintiffs substantial sums of money in the form of pension and retirement benefits and contractual obligations under their collective bargaining agreement. *Id.* at 1219. The plaintiffs further alleged that the conveyance of Keystone to CHS Acquisition, which was incorporated by Corral and represented as an "independent buyer," was a false and fraudulent conveyance entered into by those parties for the purpose of avoiding the claims of the plaintiffs. *Id.*

The district court held:

> This cause of action, like the claim for common law fraud, is preempted by both the LMRA and the NLRA. As the plaintiffs' allegations concede, they are only 'preexisting creditors' of Keystone to the extent that Keystone owes them monies under the terms of the CBA and Pension Agreement. Indeed, the Shutdown Agreement also directly addresses the plaintiffs' eligibility for these benefits. Thus, it would be necessary to analyze the terms of at least *three* labor agreements in order to resolve the plaintiffs' fraudulent conveyance claim. Obviously, then, this cause of action is preempted by sec. 301.

Id. at 1219 (emphasis in original).

In *Deford v. Soo Line R. Co.*, 867 F.2d 1080, 1081-82 (8th Cir. 1988), employees adversely affected by the sale of a portion of a railroad's rail lines and a labor association brought an action alleging common law creditors' rights violations and a Minnesota Uniform Fraudulent Transfer Act violation in state court. The employees attempted to avoid removal of their action to federal

court by arguing that the Minnesota Fraudulent Transfer Act imposed duties and obligations on all creditors completely independent of any collective bargaining agreement. *Id.* at 1087.

The court of appeals found that the existence and extent of the creditors' rights asserted by the employees could be determined only by interpreting the collective bargaining agreements. *Id.* at 1086. The court noted that the employees, in their complaint, predicated their claims upon entitlements to accrued but unpaid wages, vacation pay, life and health insurance, pension contributions, and severance benefits arising "pursuant to continuing labor contracts and employee protection agreements." *Id.* Therefore, the court concluded that the creditors' rights asserted by the employees directly involved the interpretation of collective bargaining agreements and were, therefore, preempted under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1982). *Id.* at 1087.

Similarly, I would hold in the case before this court that the unions' cause of action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by § 301 of the LMRA, 29 U.S.C. § 185, because resolution of the unions' cause of action before this court will require substantial interpretation of the collective bargaining agreement between the unions and Continental Can Company. The majority opinion is simply wrong when it asserts that "any references in future stages of this litigation to collective-bargaining agreements will be 'tangential.' " Majority op. at 28.

For the above reasons, I respectfully dissent.

I am authorized to state that Justice William G. Callow and Justice Donald W. Steinmetz join in this dissenting opinion.

SUPREME COURT
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

REMITTITUR

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, IAM LOCAL 437, IAM LOCAL 710,
IAM DISTRICT 10, IAM DISTRICT 172 INDIVIDUALLY AND AS AUTHORIZED REPRESENTATIVES OF ALL IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN COMPANY, CCC SERIES 200, INC. INTER-AMERICAN PACKAGING, INC., AND GP ACQUISITION COMPANY, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES CAN COMPANY, A GEORGIA CORPORATION, CONTINENTAL CAN COMPANY, U.S.A., INC., A DELAWARE CORPORATION,
CCC SERIES 200, INC., A DELAWARE CORPORATION, INTER-AMERICAN PACKAGING, INC., A PENNSYLVANIA CORPORATION,
GP ACQUISITION COMPANY, INC., A PENNSYLVANIA CORPORATION, AND JOHN DOE'S 1-100, COLLECTIVE REFERRING TO THE BANKS, AND OTHER LENDERS PARTICIPATING IN THE FINANCING OF THE ACQUISITION OF CONTINENTAL CAN, PACKAGING SECTOR BY UNITED STATES CAN COMPANY,

Defendants-Respondents.

APPEAL NO. 87-1784

T.Ct. NO. 87-CV-1349

THIS CAUSE WAS AN APPEAL TO REVIEW THE JUDGMENT AND ORDER OF THE CIRCUIT COURT OF RACINE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND AJUDGED BY THIS COURT IN AN OPINION FILED ON JUNE 27, 1989, THAT:

JUDGMENT REVERSED AND CAUSE REMANDED.

NATHAN S. HEFFERNAN Wrote Decision/Opinion
WILLIAM G. CALLOW Joined Dissenting Opinion
DONALD W. STEINMETZ Joined Dissenting Opinion
LOUIS J. CECI Wrote Dissenting Opinion

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR RACINE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
AUGUST 01, 1989.

/S/MLG

MARILYN L. GRAVES
CLERK, SUPREME COURT

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Hon. Stephen A. Simanek
Circuit Court of Racine
County
Racine County Courthouse
Racine, WI 53403

Madison, September 13, 1988

To David L. Uelmen
Previant, Goldberg, Uelmen,
Gratz, Miller &
Brueggeman
P. O. Box 92099
Milwaukee, WI 53202
*

Stephen H. Skoller
Lowenstein, Sandler, Kohl,
Fisher & Boylan
65 Livingston Ave.
Roseland, N.J. 07068

The Court today announced an order in your case as follows:

No. 87-1784 *International Ass'n of Machinists & Aerospace Workers, et al. v. United States Can Company, et al.*

The court having considered the request of the court of appeals pursuant to sec. (rule) 809.61, Stats., that this court accept the certification of this appeal;

IT IS ORDERED, the certification request is granted and jurisdiction of the appeal is accepted; and

IT IS FURTHER ORDERED, the briefs previously submitted by the parties to the court of appeals may stand as the briefs of the parties in this court. The parties shall submit 10 additional copies of their briefs within 10 days of the date of this order. The parties will be notified of the date and time for oral argument in this appeal.

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MARILYN L. GRAVES
Clerk of Supreme Court.

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,
IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172
individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN COMPANY,
CCC SERIES 200, INC. INTER-AMERICAN
PACKAGING, INC., AND GP ACQUISITION
COMPANY, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation
GP ACQUISITION COMPANY, INC., a Pennsylvania Corporation, and JOHN DOE'S 1-100, collectively referring to the banks, and other lenders participating in the financing of the acquisition of Continental Can, packaging sector by United States Can Company,

Defendants-Respondents.

CERTIFICATION

No. 87-1784

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether an action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by sec. 301 of the Labor Management Relations Act when brought by a union and employees against an employer.

FACTS

The plaintiffs in this action are the International Association of Machinists and Aerospace Workers, several of the union's local and district organizations, and the union employees of the companies below (collectively IAM). The defendants include United States Can Company (U.S. Can), Continental Can Company, U.S.A., Inc. (Continental Can), and several other corporations and unidentified lenders allegedly involved in the purchase transaction. To the extent that the defendants are aligned, we will refer to them collectively as "the companies."

IAM brought this action under the Uniform Fraudulent Conveyance Act (UFCA), ch. 242, Stats.[1] IAM alleged that a leveraged buyout of Continental Can by U.S. Can violated secs. 242.04, 242.05 and 242.07 of the UFCA. IAM alleged that it had standing as a creditor because of the collective-bargaining agreement.

The companies moved to dismiss the action on the ground that it was preempted by sec. 301 of the Labor Management Relations Act (LMRA), 29 U.S.C.A. sec. 185. The trial court granted the motion, finding that: (1) the state action was based on rights arising out of the collective-bargaining agreement; and (2) resolution of the dispute would require interpretation of that agreement.

[1]The UFCA was repealed and recreated by 1987 Wis. Act 192 (eff. Apr. 8, 1988). Because this action was brought before the effective date, all references to ch. 242, Stats., are as they existed prior to repeal.

IAM then brought a motion for relief from judgment premised upon discovery documents received on the day of the motion hearing. IAM alleged that from these documents it first became aware that U.S. Can, the successor corporation, had repudiated the collective-bargaining agreement and that the alleged fraudulent transactions took place thereafter. As a result of this knowledge, IAM sought relief on the bases of surprise, newly discovered evidence, misrepresentation or "other reasons justifying relief." Sec. 806.07(1)(a)-(c), (h), Stats. The motion for relief was denied, and IAM appealed from the earlier judgment of dismissal and the order denying its motion for relief.

PREEMPTION UNDER THE LMRA

Section 301 of the LMRA preempts state law claims which are founded directly on rights created by collective-bargaining agreements or which are substantially dependent upon analysis of the terms of a collective-bargaining agreement. *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2431 (1987). The purpose of preemption is to ensure uniform interpretation of collective-bargaining agreements and to promote the peaceable, consistent resolution of labor-management disputes. *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1880 (1988).

A state claim is not preempted merely because its resolution would require addressing the same set of facts which resolution of a collective-bargaining dispute would require. *Id.* at 1883. Nor is a dispute preempted by the LMRA when it tangentially involves a provision of a collective-bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

The most recent pronouncement from the United States Supreme Court was *Lingle*, 108 S. Ct. 1877. The Court held that the employee's state law claim for retaliatory discharge was not preempted, despite the existence of a provision in the collective bargaining agreement requiring "just cause" for discharge. *Id.* at

1882. This claim was distinguished from *Lueck*, 471 U.S. 202, which involved the Wisconsin tort of bad faith in an insurance claim. *Lingle*, 108 S. Ct. at 1881. The insurance was provided through the collective-bargaining agreement, and the agreement itself established the very rights and duties which the employee was seeking to enforce. *See id.*

Another LMRA case argued extensively by the parties is *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 100 L.Ed.2d 920 (1988). *Baldracchi*, like *Lingle*, dealt with a state retaliatory discharge claim. The significant holding of *Baldracchi* is that interpretation of the collective-bargaining agreement to determine the employee's damages (rate of pay, economic benefits, etc.) was tangential and did not constitute "substantial dependence" on the agreement. *Id.* at 106. This holding was approved by the Supreme Court in *Lingle*, 108 S. Ct. at 1885 n.12.

PREEMPTION AND THE UFCA

IAM has alleged violations of three different provisions of the UFCA: (1) sec. 242.04, Stats., regarding insolvency; (2) sec. 242.05, Stats., regarding undercapitalization; and (3) sec. 242.07, Stats., regarding fraud in fact. The parties agree that IAM must establish its status as a creditor of the companies to bring a claim under the UFCA. "Creditor" is defined in sec. 242.01(3), Stats., as follows:

> "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

IAM specifically alleged that the employees were creditors under the terms of the collective bargaining agreement. Subsequent to the alleged repudiation of the agreement, IAM bases the creditor status on the fact of employment, i.e., the employees come to work on Monday and get paid on Friday.

IAM's position is that the UFCA establishes state rights which are independent of the collective bargaining agreement and thus not preempted. *See Lueck*, 471 U.S. at 212-13. Furthermore, once creditor status is proven, IAM argues that no further examination of the collective bargaining agreement need take place. Emphasis will shift instead to the transaction documents because IAM will not have to prove the specific amount of the debt owed to the employee to prove insolvency or undercapitalization. IAM also contends that should proof of the debt under the collective bargaining agreement be necessary, the interpretation would be tangential as it was in *Baldracchi*.

The companies' position is that IAM is seeking to enforce rights which spring from the collective bargaining agreement. In support, they cite to various out-of-state cases which characterize the UFCA as establishing only remedies but no substantive rights. *See, e.g., Clark v. Rossow*, 657 P.2d 903, 904 (Ariz. App. Ct. 1982). The companies also urge preemption because without the collective bargaining agreement, no creditor status can be proven.

Our research has found only one case dealing with a fraudulent conveyance claim and preemption under the LMRA. In *Brown v. Keystone Consol. Indus.*, 680 F. Supp. 1212 (N.D. Ill. 1988), the district court dismissed the employees' fraudulent conveyance claim because they were preexisting creditors only by virtue of the collective bargaining agreement. *Id.* at 1219. No significant analysis was done by the court, nor has the case been appealed to the Seventh Circuit because other claims are still pending in the district court. *See id.*

As regards the motion for relief from judgment, IAM argues that the renunciation of the collective bargaining agreement invalidates the trial court's basis for preemption—the necessity of using the agreement to establish creditor status. The companies contend that the renunciation and timing of the financing was

previously known to IAM. The trial court did not specifically make a finding on IAM's knowledge, basing its decision instead on its opinion that preemption would still occur even with this "new" evidence.

CONCLUSION

Leveraged buyouts are becoming more common, as is the use of the UFCA to prevent such buyouts. *See, e.g., United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir. 1986), *cert. denied sub nom. McClellan Realty Co. v. United States*, 107 S. Ct. 3229 (1987). The use of the UFCA by unions and employees has appeared only once in a published decision, and the viability of such claims has not yet been decided by any appellate court.

This case presents a potential conflict between federal labor law and state policy as expressed by the legislature. The decision will have statewide, as well as nationwide, impact on mergers and acquisitions.

As this appeal goes beyond our function as an error-correcting court, it is more appropriately decided by the supreme court, whose function is to declare the law and public policy of the state. *See State v. Mosley*, 102 Wis.2d 636, 665-66, 307 N.W.2d 200, 216-17 (1981). We therefore respectfully certify the appeal in this case to the Wisconsin Supreme Court pursuant to Rule 809.61, Stats.

STATE OF WISCONSIN :	CIRCUIT COURT BRANCH 2	: RACINE COUNTY

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL DISTRICT 172, individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

Plaintiffs,

-vs-

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation, GP ACQUISITION COMPANY, INC., a Pennsylvania corporation, and JOHN DOE'S 1-100, collectively referring to the banks and other lenders participating in the financing of the acquisition of Continental Can packaging sector by United States Can Co.,

Defendants.

Case No. 87-CV-1349

Proceedings held before the HONORABLE STEPHEN A. SIMANEK, Circuit Court Judge-Branch 2, Racine County, Wisconsin, on July 24, 1987.

APPEARANCES:

Stephen H. Skoller and Kurt C. Kobelt, Attorneys at Law, appearing on behalf of the Plaintiffs.

Robert Christensen, Susan Maisa and Deborah Patel, Attorneys at Law, appearing on behalf of Defendant, Continental Can Company, U.S.A., Inc.

Emily Mueller, Carson P. Veach and Rody Biggert, Attorneys at Law, appearing on behalf of Defendant, United States Can Company, CCC Series 200, Inc., Inter-American Packaging Inc., GP Acquisition Company, Inc.

THE COURT: As I indicated earlier, the Court has had the opportunity to review the briefs both in support and opposition to the motion brought by the Defendants under Section 802.06(3) for judgment on the pleadings, presumably either for failure to state a claim upon which relief can be granted or a lack of subject matter jurisdiction by this Court over this dispute because of the preemption contained in the federal labor laws, specifically Section 301 of the Labor Management Relations Act. I have also now had the opportunity to hear oral argument presented on behalf of both the moving party and the party in opposition to the motion, and I must make a determination under the statute whether or not judgment on the pleadings should be granted. In order to do that, the Court must accept the allegations contained in the complaint, the pleadings in dispute here as factually proven and then determine whether or not based on those pleadings as a matter of law the Plaintiff could prevail. We could go back with respect to the theories and doctrines of the federal labor law and the preemption doctrine back to the Garmon and San Diego Building Trades case and subsequent cases to learn that one of the cornerstones of the federal labor law is the attempt through legislation to create—through federal legislation to create a uniformity in dealing with disputes between employers and employees and that frequently that striving for uniformity causes along the way some inequities. Those inequities are lived with because

of the overriding benefits of the uniformity. The Defendants in this case have come to this Court asking this Court to dismiss the Plaintiffs' cause of action because this Court has no jurisdiction over a dispute which the Defendants feel is preempted by Section 301 of the Labor Management Relations Act. The basis for that motion is that the Plaintiffs' claim here is a claim based upon the collective bargaining agreement for which they seek redress through the Uniform Fraudulent Conveyance Act, Chapter 242 of the Wisconsin Statutes. The Plaintiffs claim in opposition to that motion to dismiss that this state action is not preempted because they need not rely on rights created under the collective bargaining agreement to pursue a remedy provided to creditors under Chapter 242 and that in order to be preempted the Defendants here must show that their claim is inextricably intertwined with the rights created under the collective bargaining agreement in order for the preemption to be triggered. As I indicated, I heard the—I read the briefs and I have heard the arguments. It is often difficult to articulate a cogent decision from the bench, but I will try to be as articulate as I can be in rendering the decision. I believe that the Defendants, here the moving parties, have met their burden under 802.06(3) and have demonstrated to the Court that they should be granted judgment on the pleadings. I say that because I accept the argument offered by the Defendants that this is an action which is grounded upon and entirely based upon rights created in the collective bargaining agreement. The attempt to obtain a remedy for an alleged violation or potential violation of those rights created under the collective bargaining agreement through the auspices of the Uniform Fraudulent Conveyance Act, Chapter 242, does not take the underlying claim out of the arena which is preempted by the federal labor laws. The claim remains the same, rights guaranteed to the employees through their collective bargaining agreement, whether it be pension rights, wage rights, health insurance benefit rights or whatever other rights are guaranteed under that collective bargaining agreement are the type of basis for a claim which the

federal labor laws tell the state courts keep your hands off and these disputes must be resolved in a uniform manner. I am satisfied that whether we call the issue one of status to bring the action under the Uniform Fraudulent Conveyance Act or whether we call it endorsement of a claim or utilization of a remedy or whatever we call it, it is undeniable that the basis for being in court is an agreement reached between the employees and the employers to provide certain benefits to the employees and that to guarantee compliance with those contractual obligations. This matter was brought under the auspices of Chapter 242. It does not change the nature of the animal. The animal is still protection of rights guaranteed by the collective bargaining agreement. The claim itself for which 242 gives a remedy is a claim entirely founded on a collective bargaining agreement. Plaintiffs in this lawsuit could not be creditors, but for the underlying rights negotiated by the Union with the employers in the collective bargaining agreement. Their status then as a creditor under Chapter 242 is completely derived from negotiated rights contained or negotiated benefits contained in the collective bargaining agreement. Under these circumstances I believe in applying the rationale contained in the cases cited will require this Court to accept the federal dictate—the federal law dictate that a state court cannot step in and interpret and decide this case in this forum. I am satisfied that the underlying right derives from the collective bargaining agreement and a resolution of the dispute under 242 will require this Court to evaluate and interpret a collective bargaining agreement. It is clear that I do not have the authority to do so based on the preemption doctrine as it is set forth in the statute and as it is interpreted by the cases cited. The claim is founded directly on rights created by the collective bargaining agreement, and that language found in the *Caterpillar* case, the recent Supreme Court case decided June 9, 1987, tells this Court that I do not have jurisdiction over this dispute. I am concerned every time you read in the paper or hear in the financial news of a restructuring or an LBO, you cannot escape the realization that that

buy-out or restructuring is to make the remaining corporation what the commentators like to call a lean and mean competitor. To accomplish that, the ax falls often times first on the employees by reduction in work force. I am not unaware of the jeopardy in which the Plaintiffs here are placed or at least a potential jeopardy, but the forum in which to exercise and protect those rights created under the collective bargaining agreement is not under Chapter 242 in the State of Wisconsin, Circuit Court Branch 2 for Racine County. The federal law has said the forum lies elsewhere. Therefore, the Court will grant the motion of all named Defendants who have joined the motion to dismiss. I will grant that motion under 802.06(3). I suppose I could cite the string of cases here on the record in the decision for the basis for this decision; however, I think they have been discussed to a great extent here, and in relying upon *Caterpillar,* relying upon *Gibson* and relying upon *Lueck,* I believe the Defendants, here the moving parties, have met their burden. Motion granted.

STATE OF WISCONSIN : CIRCUIT COURT : RACINE COUNTY

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172, individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

Plaintiffs,

v.

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation, GP ACQUISITION COMPANY, INC., a Pennsylvania corporation, and JOHN DOE's 1-100, collectively referring to the banks and other lenders participating in the financing of the acquisition of Continental Can packaging sector by United States Can Co.,

Defendants.

Case No. 87-CV-1349

ORDER FOR JUDGMENT

The motion of defendants Continental Can Company USA, Inc., United States Can Company, CCC Series 200, Inc., Inter-American Packaging, Inc. and GP Acquisition Company, Inc. to dismiss the above-encaptioned action on the ground that it is preempted by sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185, having come on for hearing before the Court, Stephen A. Simanek, presiding, at 1:00 in the afternoon of the 24th day of July, 1987; defendant Continental Can Company USA, Inc. appearing by Robert A. Christensen and Susan R. Maisa, defendants United States Can Company, CCC Series 200, Inc., Inter-American Packaging, Inc. and GP Acquisition Company, Inc. appearing by Carson P. Veach, Rody P. Biggert and Emily S. Miller; and plaintiff having appeared by Stephen H. Skoller and Kurt Kobelt; and the Court having considered the briefs of counsel, having heard the oral argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED That judgment be entered dismissing the above-encaptioned action without costs to any party as against any other party.

BY THE COURT:

/s/ STEPHEN A. SIMANEK

Stephen A. Simanek
Circuit Judge—Branch 2

STATE OF WISCONSIN : CIRCUIT COURT : RACINE COUNTY

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172, individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

Plaintiffs,

v.

Case No. 87-CV-1349

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation, GP ACQUISITION COMPANY, INC., a Pennsylvania corporation, and JOHN DOE's 1-100, collectively referring to the banks and other lenders participating in the financing of the acquisition of Continental Can packaging sector by the United States Can Co.,

Defendants.

JUDGMENT

Upon the order of the Court dated 8-10-87, directing judgment dismissing the complaint,

On motion of the attorneys for United States Can Company, Continental Can Company USA, Inc., CCC Series 200, Inc., Inter-American Packaging, Inc., and GP Acquisition Company, Inc.,

IT IS HEREBY ADJUDGED that the complaint of the plaintiffs in the above-encaptioned action be, and hereby is, DISMISSED and that no party shall recover costs against any other party.

Entered this 10th day of August, 1987.

BY THE COURT:

/s/ YVONNE T. JONES

Lawrence E. Flynn
Clerk of the Circuit Court

Supreme Court, U.S.
FILED
DEC 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STATES CAN COMPANY, a Georgia Corporation,
CONTINENTAL BEVERAGE PACKAGING, INC.,
a Delaware Corporation,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-508

UNITED STATES CAN COMPANY, a Georgia Corporation,
CONTINENTAL BEVERAGE PACKAGING, INC.,
a Delaware Corporation,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves a challenge by the respondents unions (on their own behalf and on behalf of the employees they represent) to the leveraged buyout of their members' employer, petitioner general packaging division of Continental Can Company, by petitioner United States Can Company. Respondents brought suit against petitioners in state trial court in Wisconsin under the state's Uniform Fraudulent Transfer Act, Wis. Stat. § 242 *et seq.* ("UFTA") which provides that every conveyance of any type, made without fair consideration, that (1) renders

a person insolvent, or (2) leaves a person undercapitalized, or (3) was made with the intent of defrauding another person, is fraudulent as to any of that person's creditors. The law is one of general application, having nothing to do with labor-management relations, or labor contracts, except incidentally as such a contract may make someone a creditor. The respondents asserted standing to sue under the UFTA as representatives of employees, creditors of Continental Can by virtue of their employee status as defined in their collective bargaining agreement. Respondents also asserted standing as creditors by virtue of the dues check off to which they were entitled as collective bargaining representatives.

The complaint alleged three different violations of the state UFTA, tracking the three provisions of that statute. The first claim is that the buyout would render one or more of the petitioners insolvent. The second claim is that the buyout would leave one or more of the petitioners with "unreasonably small capital," and the third is that the transaction was entered into intentionally "to hinder, delay or defraud" creditors.

Shortly after discovery in the matter began the trial court granted petitioners' motion to dismiss the complaint on labor pre-emption grounds. In particular, that court ruled that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), strips state courts of all jurisdiction to address any claim that is in any way related to a right created by a collective bargaining agreement. The trial court then assumed that respondents' claims were based on the labor agreement between the unions and Continental Can, apparently because that agreement established the rates of pay (and dues check off) due to respondents. Pet. 43A.

Respondents appealed the decision granting the motion to dismiss to the state intermediate appellate court, which certified the matter to the state supreme court. Pet. 2A. The Wisconsin Supreme Court, in a carefully reasoned

opinion which derived the applicable legal standards from this Court's recent decisions in this area, determined that in its "present state-claim posture" the dispute is not pre-empted, and accordingly remanded for further proceedings. Pet. 21A. In the meanwhile, the leveraged buy-out took place, the new entity continued in operation, and the respondent unions continued to represent the bargaining unit employees.

ARGUMENT

This Court does not have statutory jurisdiction over the state court interlocutory decision the petitioners challenge here. Pp. 3-9, *infra*. Even if there were jurisdiction, the Court should deny the writ because the labor pre-emption question raised is one that is governed by a body of this Court's decisional law that now requires elaboration in developed factual settings, and this proceeding was truncated by a dismissal before trial and, indeed, before discovery had begun in earnest. Pp. 10-11, *infra*. And, while the petitioners claim otherwise, the decision below does not create a conflict with the decision of any other court nor has it served to unsettle corporate merger and acquisition transactions. Pp. 11-14, *infra*. In sum, this case does not warrant this Court's plenary consideration at this time.

I. The Court Does Not Have Statutory Jurisdiction Over This State Court Interlocutory Decision.

This Court's *certiorari* jurisdiction over state court judgments is limited to "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257. This case is here in an interlocutory setting, the order under review having sent the case back to the trial court for discovery and trial. There has been no final determination of any rights; indeed, the trial process was truncated by the grant of a motion to dismiss shortly

after discovery began. And as we now show, this case does *not* fall within any of the four recognized narrowly defined exceptions to the final judgment rule recognized by this Court, *e.g.*, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-487 (1975).

Petitioners assert that this case is final for the same reason that *Belknap v. Hale*, 463 U.S. 491, 497-498 n.5 (1983), was deemed to be final. *Belknap* was determined to fall within the fourth exception to the finalty rule elucidated in *Cox*; as petitioners' jurisdictional argument indicates, only that exception can be said to provide even arguable support for the Court's jurisdiction in this case. We therefore turn to the question of whether this case is, indeed, within that exception (and treat the other possibilities only in the margin).[1]

In cases falling within the fourth *Cox* exception, the Court has asserted jurisdiction over interlocutory decisions in which *all* of the following factors are present: (1) the federal issues have been finally decided; (2) reversal of the state court on the federal issue would resolve the litigation; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 804. Far from satisfying all three of these requirements, this case in its pres-

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[1] The first category consists of cases in which as a practical matter any resolution of the federal question would completely resolve the case. Here, assuming that the federal question is resolved in favor of respondents, they still would have to prevail on the merits of their claims in order to obtain a judgment. The second consists of cases in which the same federal issue will remain regardless of the outcome of future state court proceedings. Here, if petitioners prevail on the merits, the pre-emption claim will drop out of the suit. And the third category consists of cases in which the interlocutory setting presents the only opportunity to review the federal issue. Here, the federal pre-emption issue will remain a live appeal issue should respondents prevail.

ent posture satisfies none of them. We will address the factors in turn.

1. This is not a case in which there is a single federal issue that can be finally decided at the threshold. The trial court dismissed the complaint at the beginning of the law suit, before any defense other than the particular federal pre-emption defense at issue could be raised and addressed. In its present footing it is far from clear what the contested issues will be at trial. One thing, however, is clear: regardless how this Court would resolve the question presented in this petition, federal pre-emption questions will remain in this case.

Thus, if this Court were to grant the writ, affirm the Wisconsin court's judgment, and the matter were to be sent back to trial, at least three federal pre-emption issues could foreseeably arise.

First, the very LMRA § 301 pre-emption issue decided by this Court could recur. The Court has made clear that § 301 pre-empts only those claims whose resolution is "substantially dependent upon analysis of the terms of [a labor] agreement." *Allis-Chalmers v. Lueck*, 471 U.S. 202, 220 (1985). The determining factor is not the conflicting labels the parties may attach to a claim, but the substance of the claim, and in particular the substance of the analysis required of the trial court to resolve the claim. *Id.* at 211, 219.[2]

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[2] *Allis-Chalmers*, of course, came to this Court in an interlocutory setting. The trial court, there, however, unlike the trial court here, had ruled that the plaintiffs' claim had to be treated as an LMRA § 301 claim, and as such had to be dismissed for failure to exhaust the arbitral remedy available under the contract. *See* 471 U.S. at 207. Thus it may have appeared, given the setting of the case and the novelty at that time of this branch of the labor pre-emption doctrine, that all federal issues had been finally resolved. In any event, in that case neither respondent nor any other party argued to the Court that it lacked jurisdiction over the case; the jurisdictional issue was neither briefed, argued, nor discussed in the Court's opinion.

Not surprisingly, then, the judgment under review is grounded on the Wisconsin court's determination that, *in this case's current posture*, it does not appear that federal contract interpretation questions would play any substantial role at trial, and that the trial court's decision at this stage was therefore error. Such a case-specific, practical determination, however, does not—indeed cannot—finally resolve the § 301 issue, for trials sometimes turn out quite differently than anticipated. And certainly nothing in the Wisconsin court's order would prevent petitioners from reintroducing the same pre-emption claim raised here should it come to pass that the state court's assumptions about the course of the trial provided inaccurate. The issue is still a live one.

Second, even assuming that the Wisconsin court's sensible prediction proves accurate, and federal labor law issues play only a minor and incidental role at the trial, a federal question nevertheless will be presented the few times the labor agreement becomes an issue, as the Wisconsin court itself recognized. *See* Pet. 13A. *See also Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877, 1885 n.12 (1988) (section 301 mandates that federal law would govern incidental questions of contract interpretation that might arise in the course of deciding any state law claim). Thus residual issues of federal contract interpretation remain in the litigation.

Third, plaintiffs' third cause of action, that the leveraged buyout was part of a fraudulent scheme to deprive them the benefit of their labor contract, raises unaddressed labor pre-emption questions under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Indeed, defendants raised *Garmon* pre-emption issues before the intermediate appellate court as an alternate ground in support of the trial court's ruling, and on remand those issues could well be before the state courts again.

Even a reversal by this Court would not necessarily resolve all federal questions in this litigation. LMRA § 301 is a jurisdictional statute that, when it applies, deprives state courts of jurisdiction over certain state law claims, *not* over suits that were or could be pleaded as federal contract claims. The state trial court's ruling that the respondents' claims were pre-empted, and, as a result, this suit had to be dismissed for want of state court jurisdiction, is doubly wrong.

Petitioners' pre-emption argument rests on the proposition that any claims respondents may have are, of necessity, § 301 claims, and not that respondents have no valid claims. And *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), holds that state courts *do* have jurisdiction over § 301 claims. Accordingly, even if the Wisconsin Supreme Court erred in its pre-emption ruling—and it did not—this action would have to be remanded to the state trial court to be resolved as a § 301 suit. *See Allis-Chalmers*, 471 U.S. at 220-221. At that point the federal question will arise how the motion to dismiss should properly be resolved under federal law.[3] And that federal question has not yet even been considered by the state courts.

The existence of these unresolved labor pre-emption issues render the Wisconsin court's judgment not final. *See Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (judgment

[3] Were this suit treated as a § 301 suit, petitioners presumably would argue that it should be dismissed either for failure to exhaust the grievance procedure established in the labor agreement or on the ground that no contract violation had occurred. The question whether disputes of this nature were intended by the parties to the labor agreement to be subject to arbitration, and, if not, the question of petitioners' obligations under the agreement, however, are federal questions whose resolution depends upon the terms of the labor agreement and the federal characterization of the claim. Those issues have not yet been litigated, and it is far from clear how this suit should be treated on the unlikely assumption that the claims should have been treated as section 301 claims.

not final where "other federal issues will be involved in the trial court").

In sum, contrary to petitioners' jurisdictional argument, the posture of this case is in stark contrast to the posture of *Belknap, Inc. v. Hale, supra.* *See* Pet. at 2. The *sole* federal pre-emption claim in that case was the *Garmon* pre-emption claim that the case belonged before the National Labor Relations Board, and not a state court. A ruling that the suit was not pre-empted (which eventuated) would leave no federal issues in the case. A ruling that the claims were pre-empted would require dismissal of the case. Thus, the Court's ruling there—unlike any possible ruling in this case—finally determined all foreseeable federal issues in the case.

2. Nor, as *Cox* requires, would a reversal by this Court necessarily resolve this litigation. As discussed above, were the Court to grant the writ and reverse the Wisconsin court, this case would be returned to the trial court, which would be required to treat it as one brought under LMRA § 301. One of the principal purposes behind the finality requirement is to avoid piecemeal review of state court judgments. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 160 (1973). Petitioners' suggestion that the Court has jurisdiction over this case cannot be reconciled with that purpose.

3. Finally, allowing this suit to proceed poses no substantial risk that federal policy wil be eroded. Virtually all of the cases deemed final under the fourth *Cox* factor involve allegations of irreparable harm to a federally-protected right. *See, e.g., Cox; Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In such a case, the delay occasioned by allowing the matter to be fully litigated in the state courts before this Court addresses the federal claim would seriously undermine the federal principle whose vindication is sought. Here, in contrast, petitioners face no risk of irreparable harm of any kind—let alone

harm to a federally protected interest—should this suit proceed. The buyout that led to the litigation has taken place, the business is in operation, and the employees represented by the respondent union are continuing to do their jobs. By being required to wait until a final judgment is reached before they seek federal review, petitioners suffer only the harm that is suffered by any losing party to an interlocutory decision.

In this regard as well this case is different than *Belknap v. Hale*, and the case upon which the Court in *Belknap* particularly relied in asserting jurisdiction, *Construction Laborers v. Curry*, 371 U.S. 542, 553 (1963). Those cases involved a *Garmon* labor pre-emption claim that, when it applies, functions to *strip state courts of all jurisdiction over a controversy*, because federal law requires that the National Labor Relations Board have primary jurisdiction over certain labor disputes. In such a situation, "to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts." *Belknap*, at 497 n.5 (citation omitted).

Here, in contrast, the issue is not which forum has the power to hear the matter, but whether state or federal law applies. Assuming what is plainly not the case, that petitioners' pre-emption claim has merit, the state court has the same jurisdiction as a federal court to resolve respondents' LMRA § 301 claim. Allowing the action to proceed poses no threat to any court's jurisdiction or to the Labor Board's primary jurisdiction. No federal interest will be compromised by the Court's decision to allow this matter to be finally resolved by the state system before considering petitioners' federal claim.

II. The Court Should Not Grant Review In This Case Because It Comes To The Court In An Undeveloped Factual Setting.

Even if we are wrong and the Court were ultimately to determine that there is jurisdiction over this matter, the foregoing is more than sufficient to demonstrate that the Court's jurisdiction is problematic. And the critical consideration in that regard—the interlocutory nature of the case—serves also to show that this case does not warrant this Court's plenary review at this time. For the truncated proceedings thus far do not provide the Court the concrete factual setting necessary for the elaboration of a legal principle that the Court has recognized must "be fleshed out on a case-by-case basis." *Allis-Chalmers*, 471 U.S. at 220.

There has been no trial here, indeed there has been virtually no discovery. As a result, the Wisconsin court's analysis of the nature of the claims before it was inevitably conjectural to a certain extent. Given the setting of the case, it is impossible to determine with certainty what respondents will have to prove to make out their claims, and therefore to what extent these claims involve interpretation of a collective bargaining agreement or other considerations of federal labor policy. Under this Court's decisions from *Allis-Chalmers* through *Lingle*, these are the factors that govern in deciding LMRA § 301 pre-emption claims. This case is far too undeveloped to serve as a vehicle for further refinement of the present doctrine.

Similarly, another question posed by the petition—whether all claims involving rights that derive from an employment relationship whose terms have been set in a collective bargaining agreement should automatically be pre-empted—is not one that should be answered in the abstract. Respondents believe that as this litigation proceeds it will become manifest that federal issues con-

cerning the labor agreement will be merely one of many background, collateral, issues the trial court will consider in rendering judgment, and that labor contract interpretation will play no conclusive role in this trial. Petitioners, of course, insist that because the employees' status as creditors derives from the fact of their employment relationship, somehow the federal policy of uniformity of contract interpretation requires pre-emption. To the extent that the petitioners' position has any merit at all, the Court will be in a far better position to consider it after a full trial on the merits. Any judgment by the court at this time will be necessarily grounded in part on speculation about the course of a trial that has not yet taken place.

In an area such as LMRA § 301 pre-emption that the Court has already determined calls for case-by-case determinations, it seems most sensible to await completed cases. The basic rules governing resolution of such claims have been set, and what is required now is elaboration of those rules in the context of concrete factual settings.

III. The Wisconsin Supreme Court Decision Does Not Conflict With The Decision Of Any Other Court.

There is no conflict among the courts that could warrant a grant of this case in its interlocutory setting. The Wisconsin Supreme Court's decision is a case of first impression under LMRA § 301. The one case to which petitioners refer in text as being in tension with this one is *not* an LMRA § 301 case. *See* Pet. at 11-13 (citing and discussing *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S.Ct. 3265 (1989)).

Deford held that a state law claim under the Minnesota Uniform Fraudulent Transfer Act was properly removed to federal court because of the pre-emptive force of the Interstate Commerce Act, 49 U.S.C. § 10501(d), and of the Railway Labor Act, 45 U.S.C. § 153, ("RLA") which mandates that so-called minor disputes be resolved

by arbitration through the National Railway Adjustment Board.[4]

Here the Interstate Commerce Act does *not* apply at all; to the extent Deford's claims were pre-empted by the ICA, the case is wholly inapposite. Nor does *Deford*'s RLA holding create a square conflict, for it is far from clear that the pre-emptive effect of LMRA § 301 is identical to the pre-emptive effect of RLA § 3, and only on the premise that there is such an identity is there a conflict. Indeed, this Court has warned repeatedly that the federal common law of the Railway Labor Act may not be assumed to apply automatically to analogous provisions under the National Labor Relations Act. *See Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570, 579 n.11 (1971) ("all parallels between the NLRA and the Railway Labor Act [] should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"); *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-384 (1969).

RLA § 3 calls for mandatory adjustment of grievances by an arbitral board, reflecting Congress' judgment that all minor disputes must be resolved in binding arbitration. The NLRA and the LMRA take a very different approach to contract disputes, mandating only a federal preference for whatever grievance resolution system the parties adopt. It is perfectly rational to suppose that pre-emptive effect of the provision of the RLA calling for binding arbitration of disputes accordingly is greater than the pre-emptive effect of the LMRA provision calling for a federal law of labor contract interpretation.[5]

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[4] *Deford's* Railway Labor Act holding squarely conflicts with the earlier decision by the Third Circuit in *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie Ry. Co.*, 858 F.2d 536 (1988). This Court recently denied *certiorari* in *Deford*. No. 88-1824 (July 3, 1989).

[5] In a footnoted string citation, petitioners assert that "at least" three other United States Courts of Appeals disagree with the

IV. The Wisconsin Supreme Court's Decision Does Not Pose A Threat To Proper Mergers And Acquisitions, Or To Sound Labor Relations.

Petitioners argue finally that the decision below must be reviewed immediately because the ruling as applied to challenges to leveraged buyouts in particular threatens to wreak havoc upon this increasingly common form of commercial transaction. Pet. at 14. But petitioners point to *no* buyouts that have been thwarted by similar court actions. Indeed, petitioners point to *only one other case* in which a similar challenge to a leveraged buyout even has been raised. *See Deford, supra.* There is no merit to the suggestion that leveraged buyout labor pre-emption law is in a state of confusion or that corporations are facing burgeoning conflicting court decisions across the country on this issue.

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analysis of the Wisconsin Supreme Court. Pet. at 12 & n.7. All of these cases, however, involve fact patterns distinct from the facts of this case; indeed, to the extent the cases present similar LMRA § 301 questions, the decisions are entirely consistent with the holding of the court here. All of the claims ruled pre-empted were completely dependent on the interpretation of a collective bargaining agreement: the state claim succeeded or failed depending upon how the bargaining agreement was understood. In the cases that were not pre-empted, as in the instant case, the meaning of the collective bargaining agreement was either irrelevant to the outcome of the suit, or was merely one background fact among many that the court had to consider in resolving the suit. The outcome of the suit did *not* turn on the meaning of the labor contract.

See Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033 (6th Cir. 1989) (claim that employer violated rehire and disability provisions of labor agreement pre-empted even though claim pleaded in fraud rather than contract); *Gibson v. AT&T Technologies*, 782 686 (7th Cir.) (claim for layoff allowance under labor contract pre-empted even though claim pleaded in tort rather than contract) *cert. denied*, 477 U.S. 905 (1986); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988) (state law privacy claim pre-empted when substance of claim "is inseparable from an interpretation of what is or is not 'reasonable' under the labor contract"), *cert. denied*, 109 S.Ct. 3158 (1989).

Far more to the point, this Court has considered the pre-emptive scope of LMRA § 301 four times in as many years.[6] The state and federal courts now addressing § 301 pre-emption claims are occupied in developing the kind of case-specific jurisprudence called for in those decisions. This Court, it appears, has therefore concluded that at this stage a further process of litigating elucidation in the lower courts would be beneficial: within the last six months it has denied the writ in at least five cases raising § 301 pre-emption claims in a variety of different factual settings.[7] Nothing about this case—presenting such a § 301 claim in yet another differential factual context and on an undeveloped record—suggests that it should be treated differently.

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[6] *See Allis Chalmers, supra*; *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar v. Williams*, 482 U.S. 386 (1987); *Lingle, supra.*

[7] No. 88-2033, *Roberts v. Sun Exploration and Production Co.* (employee discharge claim pre-empted), *cert. denied*, 58 U.S.L.W. 3201 (Oct. 2, 1989); No. 88-1902, *Marositz v. Boilermakers* (tortious interference with contractual relations claim brought by one union against another should be treated as a § 301 claim), *cert. denied*, 58 U.S.L.W. 3201 (Oct. 2, 1989); No. 89-290, *Jones v. Truck Drivers Local No. 299* (state law sex discrimination claim against union pre-empted), *cert. denied*, 58 U.S.L.W. 3319 (Nov. 10, 1989); No. 89-568, *Chrysler Corp. v. Smolarek* (state law handicap discrimination claim not pre-empted), *cert. denied* (Dec. 1, 1989); No. 89-590, *Wilkinson v. Safeway Stores, Inc.* (wrongful discharge against public policy claim pre-empted), *cert. denied* (Dec. 1, 1989).

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

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No. 89-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES CAN COMPANY,
a Georgia Corporation, CONTINENTAL
BEVERAGE PACKAGING, INC.,
a Delaware Corporation,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, *et al.*,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

By alternately misapplying and ignoring this Court's decisions under 28 U.S.C. § 1257, respondents seek to avoid review of the Wisconsin Supreme Court's decision on the "far reaching" and "significant" issue (see IAM Br. to Wis. Ct. App. at 2; Cert. App. 39A) of whether state courts are empowered to apply state-law remedies to *enforce* collective bargaining agreements.[1] The principal basis for this approach (Opp. 7 & n. 3, 8-11) is respondents' surprising claim that a reversal in this Court would merely send the case back to the Wisconsin courts for development of a factual record as to the validity of the IAM's claims under Section 301 because these issues "have not yet been litigated." *Id.* This prediction seriously misstates the posture of this case. Respondents have already litigated and lost their Section 301 claims on

[1]Petitioners' Statement required by Rule 28.1 appears at p. ii of the Petition for a Writ of Certiorari.

the merits. In *International Ass'n of Machinists* v. *United States Can Co.*, No. 87-C-1221 (E.D. Wis. Apr. 12, 1989) (Rep. App. 1A to 19A), respondents challenged the identical conduct challenged in this lawsuit, but on the ground, among others, that petitioners had violated Section 301. The federal court dismissed respondents' Section 301 claims precisely because respondents had failed to exhaust available grievance procedures and otherwise had failed to state a claim. Accord *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220-21 (1985). Therefore, in view of the federal court's final and binding, unappealed judgment, the Wisconsin courts are foreclosed from considering respondents' compliance with Section 301's prerequisites. In all events, the Section 301 pre-emption issue is clearly and appropriately presented in its current posture.

Also, respondents conspicuously fail to argue, much less demonstrate, how the "new rule of law" they sought and obtained in the Wisconsin courts (see IAM Br. to Wis. Ct. App. at 2) is defensible under this Court's precedents or why it should not be summarily vacated. At the same time, respondents do not retreat from their previously stated view that the rule has "nationwide impact" and "far-reaching significance in the fields of labor law and fraudulent conveyance law." *Id.*; accord Cert. App. 39A. On this point, petitioners and respondents agree. Based on its erroneous conception of this Court's precedents, the Wisconsin Court unambiguously held that a party seeking to enforce a collective bargaining agreement may resort to state law—here a fraudulent conveyance statute—that is "not intended" to provide "substantive" rights but is simply a remedy to *enforce* private obligations, whenever a state considers such "remedial" rights to be "non-negotiable" or otherwise "significant." Cert. App. 14A-16A, 19A. This is so despite the fact that the Wisconsin Court and *all* parties to this litigation further agree that whatever obligations petitioners owe derive entirely from the labor contract—and nowhere else. See Cert. App. 4A, 19A, 21A; Pet. 10-11; Opp. 2.

Wisconsin's "new rule of law" flies in the teeth of this Court's pre-emption precedents (Pet. 8-11) and, if allowed to stand, would eviscerate the most fundamental purposes and policies of Section 301 by opening a whole range of state remedies for breach of such agreements.

I. The Decision Of The Wisconsin Supreme Court Is Final For Purposes Of Section 1257

Respondents' claim that this Court does not have statutory jurisdiction alternately misapplies and ignores this Court's precedents. Respondents acknowledge (Opp. 4) that under *Belknap Inc.* v. *Hale*, 463 U.S. 491, 497-98 n. 5 (1983), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-85 (1975), a judgment is deemed final under 28 U.S.C. § 1257 whenever (1) the federal issue decided by the state court has been finally resolved; (2) reversal of the state court on the federal issue would dispose of the entire litigation; and (3) failure to review the state court's decision immediately "might seriously erode federal policy" as expressed in the federal constitution or statutes. See, e.g., *Cox*, 420 U.S. at 482-83; *Belknap*, 463 at 497-98 n. 5; *Construction Laborers* v. *Curry*, 371 U.S. 542, 549-50 (1963). This case easily satisfies each of these requirements and respondents stretch to suggest otherwise. Respondents also ignore *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984), where this Court recognized that the only practical time for this Court to take jurisdiction of a state court's refusal to enforce a federal policy mandating arbitration was at the outset of the litigation, not after the party demanding arbitration had already been subjected to a full trial on the merits.

1. Because there is no other appeal from the decision of the Wisconsin Supreme Court on the Section 301 pre-emption question, the federal issue has now been finally resolved. Even putting aside the fact that respondents' Section 301 claims have already been decided against them on the merits in federal court (see *supra* pp. 1-2), jurisdiction under Section 1257 cannot be defeated by purely hypothetical or imagined future developments any

more in this case than in *Southland Corp.*, where the Court accepted review of a strikingly similar pre-emption question under the Federal Arbitration Act, 9 U.S.C. § 2. If that were true, this Court would *never* accept jurisdiction over refusals to apply federal law. In *Southland Corp.*, the California Supreme Court had held that claims under the California Franchise Investment Law were not pre-empted and had to be determined in the California courts rather than through an agreement to arbitrate pursuant to the Federal Arbitration Act. Before reversing on the ground that federal law pre-empted the respondent's state-law claims, this Court soundly rejected the argument that the California decision was not a "final judgment or decree" for purposes of 28 U.S.C. § 1257. 465 U.S. at 6-8. Cf. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985).[2]

2. Respondents' principal contention (Opp. 7 & n. 3, 8-11), that, following reversal, the trial court would still have to address their claims under Section 301 principles, is also meritless. If this

[2]*Allis-Chalmers* further undercuts respondents' argument that this case does not present a final, reviewable order within the *Belknap* rule. First, as respondents note, *Allis-Chalmers* also came before this Court in an "interlocutory" posture. Despite this fact, however, both the AFL-CIO as *amicus curiae* and the employer argued that the case presented a "final judgment within the meaning of *Cox* and 28 U.S.C. § 1257(2)," and that the federal policy favoring arbitration of labor disputes would require dismissal of Lueck's state-law action if the Wisconsin Supreme Court were reversed on the Section 301 pre-emption claim. See AFL-CIO Br. at 21, n. 11; Pet. at 6.

The fact that petitioners have raised additional federal defenses in the lower courts in this case (Opp. 6) also changes nothing. The *Allis-Chalmers* Court expressly noted that a second federal pre-emption question could be presented by that case under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, even if Section 301 were to have been found reconcilable with Lueck's claims. Yet, despite the Court's express recognition of this second federal question which had not yet been litigated, the Court did not question its jurisdiction. Respondents' attempt to read into the *Belknap* rule a further requirement that *no* federal issues remain in the case is therefore directly at odds with *Allis-Chalmers*.

Court were to accept review and reverse the Wisconsin Supreme Court, the case would be resolved. That a different complaint or lawsuit properly pleading Section 301 claims might be brought later is simply irrelevant. "[R]eversal of a state-court judgment in this setting will terminate litigation of the merits of *this* dispute." *Southland Corp.*, 465 U.S. at 6-7 (emphasis supplied).

Moreover, in this case, unlike *Southland Corp.*, no new lawsuit properly raising federal claims is possible because respondents have already litigated under Section 301 and lost. See *supra* pp. 1-2.

3. This case easily satisfies the third condition that the failure to review the federal issue immediately "might seriously erode" an important federal policy. *Cox*, 420 U.S. at 482-83. The plain upshot of the Wisconsin Supreme Court's decision is that a Wisconsin *trial court* will now be called upon to enforce respondents' claims, as set forth in their complaint, for wages, benefits and "claims asserted in various grievance and arbitration proceedings, all owed to the employees pursuant to the collective bargaining agreement." See R. 2, ¶ 3; Cert. App. 4A, 22A-28A & n.1. As the dissent recognized (Cert. App. 22A, 27A), this holding does violence to Congress' carefully crafted federal labor policy, which establishes an absolute preference for the resolution through contractual grievance and arbitration procedures of claims to enforce collective bargaining agreements. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-50 (1986). This Court has made it quite clear that "[t]he parties [do] not bargain for facts to be found by a court, but by an arbitrator . . . [and] '*[t]his is especially true when it comes to formulating remedies.*' " *United Paperworkers Int'l Union* v. *Misco*, 484 U.S. 29, 41, 45 (1987) (quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (emphasis in original). As the Court held in *Southland Corp.*, "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate." 465 U.S. at 7-8.

Section 301's protection of grievance and arbitration procedures is no less entitled to enforcement than was the policy in *Belknap* of deferring other types of labor-related disputes to resolution by the National Labor Relations Board. Thus, although this Court has never engrafted onto Section 1257 a requirement that the federal issue must go to the validity of the state court's jurisdiction (Opp. 9), the Section 301 policy is the full equivalent of the jurisdictional issues resolved in *Belknap*, *Southland*, and *Allis-Chalmers* because, as a practical matter, enforcement of this policy determines the forum.[3] Accordingly, allowing the action to proceed through the Wisconsin state courts at this point would present precisely the sort of forum conflict that respondents concede was sufficient to justify granting certiorari in *Belknap* and *Curry*.

Respondents also suggest that this action cannot be reviewed at this time because the case is before the Court on a less than fully developed record. Opp. 10. This argument is nonsense. Examination of respondents' complaint alone requires application of Section 301 pre-emption. That complaint sets forth their attempt to use a state fraudulent conveyance act to enforce contractual rights arising under their collective bargaining agreement. A state court claim "founded directly on rights created by collective bargaining agreements" is preempted by Section 301. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 394 (1987).[4]

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[3]This policy deliberately ousts both state and federal courts of primary jurisdiction to resolve arbitrable disputes—especially where, as here, no state "substantive" right or duty is at issue. Compare Cert. App. 16A with *Lingle* v. *Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 (1988).

[4]In effect, respondents' position, if sustained, would confine the presentation of all pre-emption claims to post-trial motions, and strike a body-blow to the principle of judicial economy.

II. The Wisconsin Supreme Court's Decision Conflicts With The Decisions Of This Court And Other Lower Courts On An Issue Of Paramount National Importance

Respondents conspicuously fail to argue that the Wisconsin Supreme Court's decision is consistent with this Court's decisions and petitioners submit that such a task would be impossible. See Pet. 8-11. Respondents do argue, however, that there is no conflict in the lower courts, a view that is demonstrably incorrect. *Deford* v. *Soo Line R.R. Co.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S. Ct. 3265 (1989), is only the most obvious example of this conflict. Notwithstanding the varying facts under which the cases arose, the unmistakable principle that emerges from *Deford* and the other federal court decisions cited in the petition is that nonsubstantive, state-law theories may not be invoked to enforce the terms of collective bargaining agreements (Pet. 11-13 & nn. 6, 7).

Because the Wisconsin Supreme Court's "new rule of law"—and the holdings of at least two additional courts[5]—cannot be reconciled with these cases, the need for this Court's guidance is particularly acute. And, as the petition made plain, even though the Wisconsin Court's error is *not* confined to cases involving leveraged buyouts, respondents wrongly suggest that there is "*only one other case*," *Deford*, raising such a challenge to a leveraged buyout. Opp. 13 (emphasis in original); compare Pet. nn. 4, 6 & 7.[6]

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[5]See *Railway Labor Executives Ass'n* v. *Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988); *International Ass'n of Machinists* v. *Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y.S. Ct. 1989).

[6]Both the petition and opposition agree that the *Deford* holding conflicts with the Third Circuit's leveraged buyout decision in *Railway Labor Executives Ass'n* v. *Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936 (3d Cir. 1988). See Pet. 11 n. 6, Opp. 12 n. 4; see also *Brown* v. *Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1219 (N.D.

(Footnote continued on following page)

Respondents' further purported distinction of *Deford* on the ground that *Deford* arose under the Railway Labor Act rather than under Section 301 (Opp. 12) is a facile one. Virtually every RLA pre-emption case decided since *Lingle* has, like *Deford*, analyzed both Section 301 and *Lingle* to decide whether claims like those brought by respondents here were pre-empted. 867 F.2d at 1087-88. To be sure, as respondents suggest (Opp. 12), parallels between the NLRA and the RLA should be drawn with care.[7] But like the court in *Deford*, this Court has long read the RLA and Section 301 *in pari materia* in resolving contract enforcement/pre-emption questions. See *Andrews* v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320, 323 (1972) (relying on *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965), to hold that "an agreement required under § 204 of the Railway Labor Act [is] 'like the Labor Management Relations Act § 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law. . .' "); *International Ass'n of Machinists* v. *Central*

(Footnote continued from previous page)
Ill. 1988) (claims for fraudulent conveyance brought by employee "creditors" under a labor contract are "obviously" pre-empted by Section 301).

See also the recently reported decisions in *International Ass'n of Machinists* v. *Allegis Corp.*, 545 N.Y.S.2d 638 (N.Y.S. Ct. 1989) (court relied on *Lingle* and Section 301 to hold that, contrary to *Deford*, RLA did not pre-empt claims under New York fraudulent conveyance statute); *Gendron* v. *Chicago & Northwestern Transp. Co.*, No. 1-88-1630, 1989 Ill. App. LEXIS 1646 (1st Dist. Oct. 30, 1989) (fraudulent conveyance action was pre-empted under RLA because, under *Lingle*, "resolution of [the] State claim depend[s] upon the meaning of a collective bargaining agreement").

[7]Neither *Chicago & N.W. Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 579 n.11 (1971) nor *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383-88 (1969), cited by respondents, involved enforcement of labor contracts or the pre-emption of related state-law theories of relief; both cases addressed the very different question of strike activity under the RLA and NLRA.

Airlines, Inc., 372 U.S. 682, 691-92 (1963) (citing *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962), for proposition that "enforceability of [labor contracts] cannot be left to the laws of the many states . . . [t]he needs of the subject matter manifestly call for uniformity").[8]

In the courts below, respondents conceded the enormous practical importance of the Wisconsin Supreme Court's "new rule of law." Respondents have never denied, and cannot deny, that Wisconsin's exception for state-law remedies would inevitably swallow up the heretofore sacrosanct principle that, under federal law, labor agreements must be enforced in the first instance through arbitration. As such, Wisconsin's rule is repugnant to the most basic purposes of Section 301 and this Court's decisions:

> [R]egardless of the rubric under which state law is invoked, § 301 precludes state regulation of the legal consequences to the parties of entering into a collective bargaining agreement. . . . Section 301 leaves no room for the states to apply their own rules of remediation to collective bargaining agreements, which is precisely what Wisconsin has attempted to do here.

AFL-CIO *Amicus Curiae* Brief in *Allis-Chalmers Corp.* v. *Lueck*, *supra*, at 3.

Finally, respondents are correct that this Court has recently denied review in a number of Section 301 pre-emption cases. But respondents vastly overgeneralize; none of those cases presented the kind of fundamental federal labor pre-emption issue presented here. See Opp. p. 14 & n.7. This case involves nothing less than resort to state law to *enforce* the terms of a contract that this Court's decisions mandate be enforced only through federal law. The Wisconsin Supreme Court fundamentally misapplied this

[8]All RLA fraudulent conveyance actions brought to date have considered the pre-emption question with respect to the RLA's "minor dispute" procedures. The "minor dispute" procedures find their analog in arbitrable disputes under Section 301 to enforce the labor contract.

Court's precedents, turning back the clock more than 30 years, in holding that suits to enforce labor contracts can be brought through a state-law, *nonsubstantive* "rule of remediation." Compare *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-57 (1957). If the law of Section 301 and collective bargaining agreements—and the settled expectations it has generated—are to be changed so drastically, it is critical for this Court to explain why.

CONCLUSION

For the reasons stated in this reply and in the petition, the Court should grant the petition for certiorari, summarily vacate the Wisconsin Supreme Court's decision, and remand with directions that the complaint be dismissed as pre-empted. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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December 15, 1989

**Counsel of Record*

APPENDIX

United States District Court
EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, et al., *Plaintiffs,* *V.* UNITED STATES CAN COMPANY, et al., *Defendants.*	JUDGMENT IN A CIVIL CASE CASE NUMBER: 87-C-1221

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants Continental Can Company, U.S.A., Inc.; United States Can Company, Inter-American Packaging, Inc., GP Acquisition Company, Inc., CCC Series 200, Inc.; and Security Pacific Business Credit, Inc's [sic] motions to dismiss plaintiffs' claims under the Labor Management Relations Act (29 U.S.C. § 185) and the Wisconsin Uniform Fraudulent Conveyance Act (Wis. Stats. §§ 242.04, 242.05, & 242.07) are hereby granted and this action is dismissed.

IT IS ALSO ORDERED AND ADJUDGED that actual costs, as determined by the clerk of court pursuant to Local Rule 9, will be assessed against plaintiffs.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Continental Can Company, U.S.A., Inc. recover of the plaintiffs $2,200.00 in attorney's fees; defendants United States Can Company, Inter-American Packaging, Inc., GP Acquisition Company, Inc., and CCC Series 200, Inc. recover of the plaintiffs $1,500.00 in attorneys' fees collectively; and defendant Security Pacific Business Credit, Inc. recover of the plaintiffs $750.00 in attorney's fees.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs pay to the clerk of court $500.00 for deposit in the *pro bono* fund of the Eastern District of Wisconsin.

IT IS FURTHER ORDERED AND ADJUDGED that defendants' motions for a protective order are denied as moot.

APPROVED: /s/ J. P. STADTMUELLER

J. P. Stadtmueller
U.S. District Judge

April 12, 1989
Date

SOFRON B. NEDILSKY
Clerk

/s/ VALERIE L. HASS
(By) Deputy Clerk

United States District Court
EASTERN DISTRICT OF WISCONSIN

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172, individually and as authorized representatives of ALL IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

Plaintiffs

vs.

UNITED STATES CAN COMPANY, a Delaware Corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware Corporation, CCC SERIES 200, INC., a Delaware Corporation, INTER-AMERICAN PACKAGING, INC., a Delaware Corporation, GP ACQUISITION COMPANY, INC., a Delaware Corporation, SECURITY PACIFIC BUSINESS CREDIT, INC., a corporation, and JOHN DOE'S 1-100, collectively referring to the BANKS AND OTHER LENDERS PARTICIPATING IN THE FINANCING OF THE ACQUISITION OF THE CONTINENTAL CAN GENERAL PACKAGING SECTOR BY UNITED STATES CAN CO.,

Defendants.

Case No. 87-C-1221

DECISION AND ORDER

Plaintiffs filed this lawsuit to contest the sale of defendant Continental Can's (Continental) general packaging division to United States Can Company (U.S. Can). Other named defendants are corporate affiliates of U.S. Can (affiliates or affiliated defendants), Security Pacific Business Credit, Inc. (Security), and "John Does 1–100, collectively referring to the Banks and Other Lenders Participating in the Financing of the Acquisition of the Continental Can General Packaging Sector By United States Can Co." (lenders, lending defendants).

Previously, plaintiffs (IAM) brought a similar action in the Circuit Court of Racine County, Wisconsin. The only discernible difference in parties is that Security Pacific was identified as "John Doe" in the state suit. Also, counts three, four and five of the complaint in the instant action are evidently identical to counts in the complaint filed in state court, asserting violations of the Wisconsin Uniform Fraudulent Conveyance Act. The additional claims before this court are asserted under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (§ 301).

Judge Simanek of the Racine County Circuit Court found plaintiffs' claims preempted by § 301. According to the materials filed in the present proceeding, that case is now on appeal.

The named defendants have filed motions to dismiss the suit in this court, as well as motions for sanctions pursuant to Fed. R. Civ. P. 11. Defendants Continental and Security each filed a motion for a protective order staying discovery until the court decided the motions to dismiss. Plaintiffs have filed a cross-motion for Rule 11 sanctions. Not all allegations of the complaint apply to each group of defendants. While seeking to avoid redundancy, I will consider the various claims in due course.

Count I

Count 1 of the complaint is brought pursuant to § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185,

and alleges that the sale of the Continental general packaging division to defendant U.S. Can is a fraudulent transfer resulting in conveyances or obligations that will render the surviving merged entity insolvent or severely and unreasonably undercapitalized. Plaintiffs allege themselves to be creditors of defendant Continental, entitled to protection against the intentional ruination of their employer-debtor. Insofar as the packaging division sale impairs the ability of Continental or the surviving entity to meet its obligations to employees, plaintiffs allege the sale to be a breach of the IAM-Continental collective bargaining agreement.

Continental urges the court to dismiss Count 1 because plaintiffs failed to utilize the grievance procedure set forth in the collective bargaining agreement. Section 301 preempts state law, asserts Continental, and contemplates arbitration rather than court action. Plaintiffs aver their claims do not implicate applying the collective bargaining agreement to resolve disputes over "wages, hours or conditions of employment."

Defendant has the better of this argument. It is well established that § 301 preempts state law. *IBEW, AFL-CIO v. Hechler,* ___ U.S. ___, 107 S.Ct. 2161 (1987). Plaintiffs ground their status as "creditors" on their position as employees. Their underlying concern is their employer's ability to meet employment and wage-related obligations: this dispute falls within the scope of § 301. Plaintiffs' related argument that the collective bargaining agreement's grievance procedure is too narrow to cover the present dispute is incorrect. According to plaintiffs, the agreement distinguishes between the "company" and "management", while this dispute is between the union and company owners. In their most distant relation, however, management represents the company owners. As Continental points out, the terms "company" and "management" appear to be used interchangeably in that portion of the agreement outlining the grievance procedure.

Plaintiffs argue that the grievance procedure set forth in article 13 of the collective bargaining agreement is not the mandatory

or exclusive means of dispute resolution allowed under the terms of that agreement. Unless the parties specifically agree otherwise, however, the grievance procedure outlined in the agreement must be taken as exclusive. *Republic Steel v. Maddox,* 379 U.S. 650, 652-53, 657-58 (1965); *Huffman v. Westinghouse Electric Corp.,* 752 F.2d 1221, 1225 n.4 (7th Cir. 1985). "Apart from matters the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." *Steelworkers v. Warrior & Gulf Co.,* 363 U.S. 574, 581 (1960).

The exhaustion requirement is also well established. Employees, acting through their union, must pursue grievance remedies through the procedure set forth in the collective bargaining agreement before bringing an action under § 301. *Republic Steel v. Maddox,* 379 U.S. at 652-53; *Vaca v. Sipes,* 386 U.S. 171, 185 (1966); *Huffman v. Westinghouse Electric Corp.,* 752 F.2d at 1223.

Plaintiffs argue that this case falls under a number of exceptions to the exhaustion requirement. One argument is that the union need not exhaust the contractual remedies where the parties have expressly agreed that the collective bargaining agreement is not the exclusive remedy. Plaintiffs do not point to such an express agreement. As indicated above, all disagreements fall within the scope of the grievance provisions unless specifically excluded.

Next, plaintiffs argue that where contractual remedies are unsatisfactory or unworkable by reason of the employer's misconduct, exhaustion of remedies is not required. Plaintiffs' primary justification for applying this exception is that the grievance procedure is not structured to provide remedies for the particular misconduct alleged. But the alleged misconduct does not prevent plaintiffs from invoking the contractual grievance procedure. The

appropriate mechanism for dealing with perceived violations of the collective bargaining agreement is through the agreement's procedure.

The same reasoning dispenses with plaintiffs' contentions that exhaustion is not required because a formal effort to pursue contractual remedies would be futile, and because the remedy sought is unobtainable through the grievance procedure. Both these arguments are also grounded on the inadequacy of the grievance procedure to provide the requested relief. But questions of grievance procedure, including the question of whether this procedure would permit the relief requested, are not for a court to decide. These questions must be left to the arbitrator. *United Electrical Radio and Machine Workers of America v. Honeywell Inc.*, 522 F.2d 1221, 1226 (7th Cir. 1975). "And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *Republic Steel v. Maddox*, 379 U.S. at 653.

Plaintiffs argue exhaustion is not required because the employer's conduct amounts to a repudiation of the collective bargaining agreement. The acquisition agreement cited by plaintiffs, while raising the possibility that Continental might be unwilling to be bound by the grievance procedure, is far from conclusive. Continental strongly asserts that the collective bargaining agreement remains in effect. There is no indication that defendant has frustrated the grievance process. Applying this exception would itself preclude use of the grievance process, thwarting the § 301 policy of enforcing collective bargaining agreements.

Count II

Count II essentially makes the same § 301 claim as Count I, but against defendant U.S. Can and its affiliates as successors to Continental and purported employers of plaintiffs under the acquisition agreement.

Defendants contend that this count should be dismissed for failure to allege the existence of a collective bargaining agreement between plaintiffs and these defendants. Even if the court might find the collective bargaining agreement remains in effect between these parties, defendants point out, plaintiffs make a claim under the agreement without having exhausted their administrative remedies. Plaintiffs counter this argument by asserting that U.S. Can assumed the economic terms and obligations of the IAM-Continental collective bargaining agreement but renounced all other terms, including the grievance procedure.

Although U.S. Can did accept the economic terms of the collective bargaining agreement, it do [sic] so only in the context of forming a contract with Continental. The assumption of economic terms gives meaning to the contract for Continental's sale of the packaging division to U.S. Can. The ruling in *Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551 (7th Cir. 1969) governs this case. In *Baker,* truck drivers sued their employer and Sears. Sears had hired the drivers for Fleet and promised them various benefits. The drivers' union had signed a collective bargaining agreement with Fleet but not with Sears. The seventh circuit found that Sears could not be made a defendant to the § 301 suit because Sears was not a party to the collective bargaining agreement providing the basis for plaintiffs' claims. *Id.* at 554. *See Loss v. Blankenship,* 673 F.2d 942 (7th Cir. 1982) (reviewing case law); *cf. Pattern Makers Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F.Supp. 792 (N.D. Ill. 1985) (§ 301 could not be used to enforce a contribution agreement between the fund and the employer because the contract was not between an employer and a labor organization). In the case before this court, U.S. Can is not a signatory to the agreement pursuant to which plaintiffs make their claim. Plaintiffs cite *In Re Plaza Mission Bottling Co.*, 14 BR 1428 (E.D.N.Y. 1981), which was not brought under § 301. However, the *Plaza* court found a bankrupt company to be a successor employer bound by a collective bargaining agree-

ment because representatives of the bankrupt had met with the union and formed an agreement to be bound by the bargaining agreement. No such separate agreement appears in the present case: Count II must be dismissed for failure to state a claim.

Counts III, IV and V

Counts III, IV and V make claims only against defendant Security Pacific and against the unknown and unidentified defendant John Doe lenders. The three counts allege violations of the Uniform Fraudulent Conveyance Act, §§ 4, 5 and 7, Wis. Stat. §§ 242.04, 242.05 and 242.07, respectively. Count III alleges that the defendant employers have made and will make conveyances and incur obligations with these defendants, without fair consideration, rendering the surviving entity insolvent within the meaning of Wis. Stat. § 242.04. Count IV alleges that the surviving entity will be so encumbered by pledges, liens and security interests to Security Pacific and the other defendant financial institutions that it will be severely and unreasonably undercapitalized within the meaning of Wis. Stat. § 242.05. Count V alleges that the defendant financial institutions have completed or will complete the conveyances and transfers attending the packaging division acquisition with actual intent to hinder, delay or defraud plaintiffs as creditors, in violation of Wis. Stat. § 242.07.

These three counts are virtually identical to counts in the state court action, and defendants contend that these claims are barred by *res judicata.* Plaintiffs state that their claims are not barred because the order of dismissal in the state action was entered only on behalf of defendants Continental and U.S. Can: Security Pacific was not a named defendant in the state court proceeding, was not served in that action, and did not appear as a defendant in state court. Further, plaintiffs argue, the state court dismissal was based on § 301 preemption which can not apply here because Security Pacific and the other lenders are not parties to a labor agreement falling within the scope of § 301.

Defendants contend the claims in counts 3–5 are barred by *res judicata* because they were dismissed by the state court. Strictly speaking, one action does not bar a second action absent an identity of parties or their privies and identity of causes of action in the two cases. *Leimert v. McCann,* 79 Wis. 2d 289, 294, 255 N.W. 2d 526 (1976). Because the defendant banks and lenders were not named parties in the first action, and the state judge "grant[ed] the motion of all named defendants who have joined the motion to dismiss," *Int'l. Ass'n. Machinists & Aerospace Workers v. United States Can Co.,* Record at 57 (Wis. Cir. Ct. July 24, 1987) (No. 87-CV-1349), identity of parties is lacking here. However, defendants evidently intend the term *res judicata* to incorporate "collateral estoppel," a not uncommon mistake. *See* Security Pacific's Reply Brief in Support of Motion to Dismiss at 3 n.2; *cf. Crowall v. Heritage Mutual Insurance Co.,* 118 Wis. 2d 120, 121–22, 346 N.W.2d 327 (Wis. App. 1983). In *Crowall,* the Wisconsin Court of Appeals held "that lack of mutuality of parties does not preclude the use of collateral estoppel when it is asserted defensively to prevent a party for [sic] relitigating an issue which has been conclusively resolved against the party in a prior case." *Id.* at 122.

As the state judge noted in considering counts 3–5 as made against the named defendants in the state action, "[t]he claim itself for which [Wisconsin Statutes chapter 242] gives a remedy is a claim entirely founded on a collective bargaining agreement. Plaintiffs in this lawsuit could not be creditors, but for the the [sic] underlying rights negotiated by the Union with the employers in the collective bargaining agreement." *Int'l. Ass'n Machinists & Aerospace Workers v. United States Can. Co.,* Record at 56 (Wis. Cir. Ct. July 24, 1987) (No. 87-CV-1349). The state judge's statement is clear, and this court is required to give the same authority to a judgment rendered by a Wisconsin court as would another Wisconsin court, under the full faith and credit implementing statute, 28 U.S.C. § 1738. *Luebke v. Marine National*

Bank of Neenah, 567 F.Supp. 1460 (E.D. Wis. 1983). That an appeal is pending in this matter does not diminish the judgment's conclusiveness. *Id.* at 1462. Collateral estoppel bars plaintiffs' claims set forth in counts 3-5 under the Uniform Fraudulent Transfer Act.

Plaintiffs argue that *res judicata,* and presumably collateral estoppel, can not apply because § 301 preemption will not apply to a cause of action against a non-party to the disputed labor agreement. That is, plaintiffs' brief suggests that since the state action's dismissal was based on § 301 preemption, the dismissal cannot have preclusive effect against the banks and lenders in this court. But in the circumstances presented here, *res judicata* (collateral estoppel) and preemption share a common foundation. A discussion of preemption as to these claims is useful, as it serves to affirm the true nature of plaintiffs' claims.

" '[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of agreement made between the parties in a labor contract,' the plaintiff's claim is preempted by § 301 of the Labor Management Relations Act." *Int'l. Brhd. Elec. Workers, AFL-CIO v. Hechler,* 107 S.Ct. at 2163. In Hechler, respondent was injured while working for Florida Power and Light Co. She sued her union in state court, alleging that " 'pursuant to contracts and agreements entered into by and between' the Union and Florida Power, and 'pursuant to the relationship by and between' the Union and respondent, the Union had a duty to ensure that respondent" was provided safety and not required to take undue risks. *Id.* at 2163-64. The Union removed the action to federal court, arguing that respondent's claim arose solely under federal law and was barred by the applicable statute of limitations. Respondent asserted that the basic nature of her action was a state common-law tort suit for the Union's negligence. *Id.*

The Supreme Court in *Hechler* noted: "Respondent's allegations of negligence assume significance if and only if the Union,

in fact, had assumed the duty of care that the complaint alleges the Union breached." *Id.* at 2168. The court did find provisions in the collective bargaining agreement and ancillary agreements between the Union and Florida Power upon which respondent could try to base an argument. "In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union . . . and, second, the nature and scope of that duty." *Id.* at 2168. Therefore, the Court found that because any finding concerning tort liability would involve contract interpretation, "[t]he need for federal uniformity in the interpretation of contract terms . . . precluded [respondent] from evading the preemptive force of section 301 by casting her claim as a state-law tort action." *Id.* at 2168.

The *Hechler* Court did not consider the question of whether the Union had a duty of care arising "through independent state law responsibilities placed upon the Union simply by virtue of its relationship with its members, rather than as a result of the collective bargaining agreement." *Id.* at 2169-69 n.5. [sic] Plaintiffs in the case at hand characterize their claims in counts 3-5 as arising solely from state law. However, plaintiffs' basis for making a claim as creditors under the Uniform Fraudulent Conveyance Act (renamed the Uniform Fraudulent Transfer Act) is their status as employees protected by the IAM-Continental collective bargaining agreement. To establish whether plaintiffs can make out a claim under the Uniform Fraudulent Conveyance Act it would be necessary to interpret plaintiffs' rights under the collective bargaining agreement.

Realleging the same claims against other defendants once removed from the underlying collective bargaining agreement does not transform the true source or nature of the claim. Plaintiffs' claims under Wisconsin's Uniform Fraudulent Conveyance Act are effectively an effort to enforce the collective bargaining agreement through an action against the defendant lenders. In these

circumstances, applying Wis. Stat. §§ 242.04, 242.05 and 242.07 would require this court to interpret the collective bargaining agreement. As the Supreme Court has pointed out, a party cannot evade the preemptive force of § 301 by casting its claim as a state law action.

Counts VI and VII

In counts six and seven of the complaint plaintiffs allege that the defendants engaged in an unlawful conspiracy to transfer assets in violation of the Uniform Fraudulent Conveyance Act and to breach the collective bargaining agreement.

Defendant Continental and affiliated defendants argue that, because counts 6 and 7 are before this court solely on the basis of pendent jurisdiction, they must be dismissed since no federal claims remain before the court. Continental also contends that these claims are barred by *res judicata,* since they arise out of the same transaction as those counts raised in the previous court action. Defendants further argue that the conspiracy claims must be viewed as preempted. Alternatively, Continental asserts, federal labor law does not allow a civil action for conspiracy. For its part, Security Pacific simply states that it is not subject to claims made pursuant to § 301 in this matter.

Plaintiff argues that the conspiracy claims do not arise under state law, but under § 301 and the federal common law of labor relations. According to plaintiffs, these claims are consistent with the federal courts' obligation under § 301 "to create a body of federal law for the enforcement of collective bargaining agreements." *Int'l Bhd. of Elec. Workers v. Hechler,* 107 S.Ct. 2161, 2165 (1987).

Section 301 is not merely a jurisdictional statute. "[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor

laws." *Textile Workers v. Lincoln Mills,* 353 U.S. 444, 456 (1956). But as discussed above, a basic requirement under this federal common law is that plaintiffs seek remedies through the procedures outlined in their collective bargaining agreement before bringing action under § 301. *See, e.g., Republic Steel v. Maddox,* 379 U.S. at 652–53. Plaintiffs' conspiracy claims against Continental Can and affiliated defendants, therefore, must fail for reasons already discussed concerning counts one and two: plaintiffs have failed to satisfy the exhaustion requirement.

And plaintiffs themselves recognize that § 301 "can be invoked only against a party to the labor contract on which the action was founded," Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss at 9 (citations omitted), since § 301, by its express terms, provides a jurisdictional basis for contract actions between an employer and a labor organization. Under plaintiffs' federal common law theory, then, Security Pacific and other banks and lenders are not subject to the conspiracy claims.

No authority indicates that a common-law conspiracy claim exists under § 301, or that allegations of conspiracy alone give rise to a cause of action. *See, e.g., Abrams v. Carrier Corp.,* 434 F.2d 1234, 1253 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971). This conclusion accords with the policy of enforcing collective bargaining agreements underlying § 301. The Supreme Court, in *Textile Mills,* "understood section 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers v. Lueck,* 471 U.S. 202, 209 (1984). Allegations of conspiracy do not clearly focus on the contract dispute itself, as analysis under § 301 requires. Rather, plaintiffs' conspiracy allegations merely recharacterize plaintiffs' underlying contract claim. To the extent the conspiracy claim is grounded on breach of the collective bargaining agreement, the conclusion reached above as to counts one and two apply. To the extent it is grounded on the Uniform Fraudulent Transfer Act, the conclusions

reached regarding counts three, four and five apply. Preemption, collateral estoppel and failure to satisfy the procedural requirements for bringing a § 301 action preclude these claims in this court.

The conspiracy claims, as alleged in the complaint, might alternatively be construed as arising under state law. In that event, the last two counts would have to be dismissed because they are before the court on the basis of pendent jurisdiction and all federal claims have dropped out of the case. As the court of appeals for this circuit stated in *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (7th Cir. 1986): "State law claims should not be retained for adjudication in federal court when the sole remaining basis for federal jurisdiction is the judge-made doctrine of pendent jurisdiction." *See also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Even if plaintiffs alleged diversity jurisdiction, Wisconsin's transactional approach to *res judicata* would apply to bar the conspiracy counts as state law claims against Continental and affiliated defendants. This approach defines a claim or cause of action as coterminous with the entire factual transaction out of which it arises. What constitutes the "transaction" is to be determined pragmatically, "giving weight to such considerations *as whether the facts are related in time, space, origin,* or motivation, whether they form a convenient trial unit, and whether this treatment as a unit conforms to the parties' expectations or business understanding or usage." *Landess v. Schmidt*, 115 Wis. 2d 186, 192, 340 N.W. 2d 213 (Wis. App. 1983) (quoting *Restatement (Second) of Judgments* § 24(2) (1982). Plaintiffs' conspiracy claims in this court are made against the same parties, based on the same events, as in the prior state court proceeding; the considerations listed above precisely identify the cases with each other; the transaction is the same. That plaintiffs might be prepared to present new evidence or theories not presented in the first action, or desire to seek new forms of relief, do [sic] not affect

this conclusion. *See DePratt v. West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 312, 334 N.W.2d 883 (1983) (citing *Restatement (Second) of Judgments* § 25 (1982). Further, the conspiracy itself cannot be construed as a separate transaction. Wisconsin law provides no civil action for conspiracy alone, but only for acts pursuant to a conspiracy. *Onderdonk v. Lamb,* 79 Wis.2d 241, 246, 255 N.W. 2d 507 (1977) (citation omitted). This latter rule bars state law conspiracy claims against not only the Continental defendants but also against the banks and other lenders, since the underlying claims are no longer present.

In sum, having fully considered the relevant law and all materials before the court, I conclude that this action should not have been filed. This decision renders moot defendants' motions for protective orders.

Sanctions

Both plaintiff and defendants request imposition of sanctions pursuant to Fed. R. Civ. P. 11, which provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith [sic] for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In opposing defendants' application for sanctions, plaintiffs urge that their complaint is grounded in a good faith argument for extension of existing law. "Plaintiffs here are asking this Court

to flex its broad powers under Section 301 to create a remedy for employees whose employers undertake a business transaction that is a fraudulent conveyance under established state laws." Plaintiffs' Brief in Opposition to Defendants' Application for Sanctions and In Support of Plaintiffs' Cross-Motion for Sanctions, at 9. This contention is not evident anywhere except in response to defendants' argument for sanctions.

Federal courts are responsible for developing law in this area specifically because the subject matter of § 301 requires application of uniform federal laws to prevail over inconsistent local rules. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). Among the mechanisms used to achieve this consistency are the exhaustion requirement, obligating disputants to first seek recourse through the disputed contract's terms, and the preemption doctrine, precluding application of state rules purporting to define the meaning or scope of relevant contract terms. Plaintiffs' action in this court is an effort to evade fundamental rules governing § 301 actions.

Plaintiffs' contention that the state court judge invited them to bring their case to federal court does not justify this action. The state judge merely indicated that the state court was not a proper forum. Plaintiffs were responsible for making reasonable inquiry into the facts and law supporting their pleading. Fed. R. Civ. P. 11.

The source and nature of plaintiffs' various claims, as well as the intended application of particular claims to particular defendants, appeared to change when plaintiffs responded to defendants' motions for dismissal. Particular defendants understandably felt compelled to respond to allegations that plaintiff subsequently indicated did not apply to those defendants. Even plaintiffs' response did not adequately clarify their aim. This confusion attributable to plaintiffs is particularly unjustified in light of the fact that several counts in the complaint essentially mirror those in the state action.

Relying on *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000 (7th Cir. 1984), plaintiffs assert that subjective bad faith must be shown by a person against whom Rule 11 sanctions are considered. But "[t]he standard used is an objective 'one of reasonableness under the circumstances,' [Fed. R. Civ. P. 11 advisory committee note], rather than a subjective one. Consequently [plaintiffs'] reliance on *Suslick* . . . , decided under the old Rule 11 with its bad faith requirement, is misplaced." *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985). The Seventh Circuit gives Rule 11 strong emphasis:

> Rule 11 requires counsel to study the law before representing its content to a federal court. An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating. Counsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorneys fees under the Rule.
> *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986).

My analysis of this case and due regard for Rule 11 compel me to impose sanctions against plaintiffs. Actual costs as determined by the clerk of court pursuant to Local Rule 9 will be assessed against plaintiffs. Reasonable attorneys' fees, as set forth below, will be allowed to defendants Security Pacific Business Credit, Inc., Continental Can Company U.S.A., Inc., and United States Can Co. and its affiliates (CCC Series 2000, Inc., Inter-American Packaging, Inc., and G.P. Acquisition Company, Inc.). These fees are based on the complexity of the case, difficulty of issues, and relative burden borne by each of the defendants in defending this action. In addition, plaintiffs will be assessed $500.00 payable to the Clerk of Courts for the Eastern District of Wisconsin for application toward this district's *pro bono* fund.

Therefore,

IT IS ORDERED that defendants' motions to dismiss and for sanctions under Fed.R.Civ.P 11 be and the same are hereby GRANTED; and

IT IS FURTHER ORDERED that defendants' motions for a protective order be and the same are hereby DENIED as moot; and

IT IS FURTHER ORDERED that plaintiffs pay attorney's fees to the respective defendants in the following amounts:

$2,200.00 to defendant Continental Can Company U.S.A., Inc.;

$1,500.00 to defendant United States Can Co. and its affiliates (CCC Series 2000, Inc., Inter-American Packaging, Inc., and G.P. Acquisition Co., Inc.), collectively; and

$750.00 to defendant Security Pacific Business Credit, Inc.; and

IT IS FURTHER ORDERED that plaintiffs pay to the clerk of court $500.00 for deposit in the *pro bono* fund of the Eastern District of Wisconsin.

Dated at Milwaukee, Wisconsin this 12th day of April, 1989.

BY THE COURT:

/s/ J.P. STADTMUELLER

J.P. Stadtmueller
U.S. District Judge